TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 229

LUCY B. BROOKE, PETITIONER,

vs.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

PETITION FOR CERTIORARI FILED APRIL 25, 1927

CERTIORARI GRANTED JUNE 6, 1927

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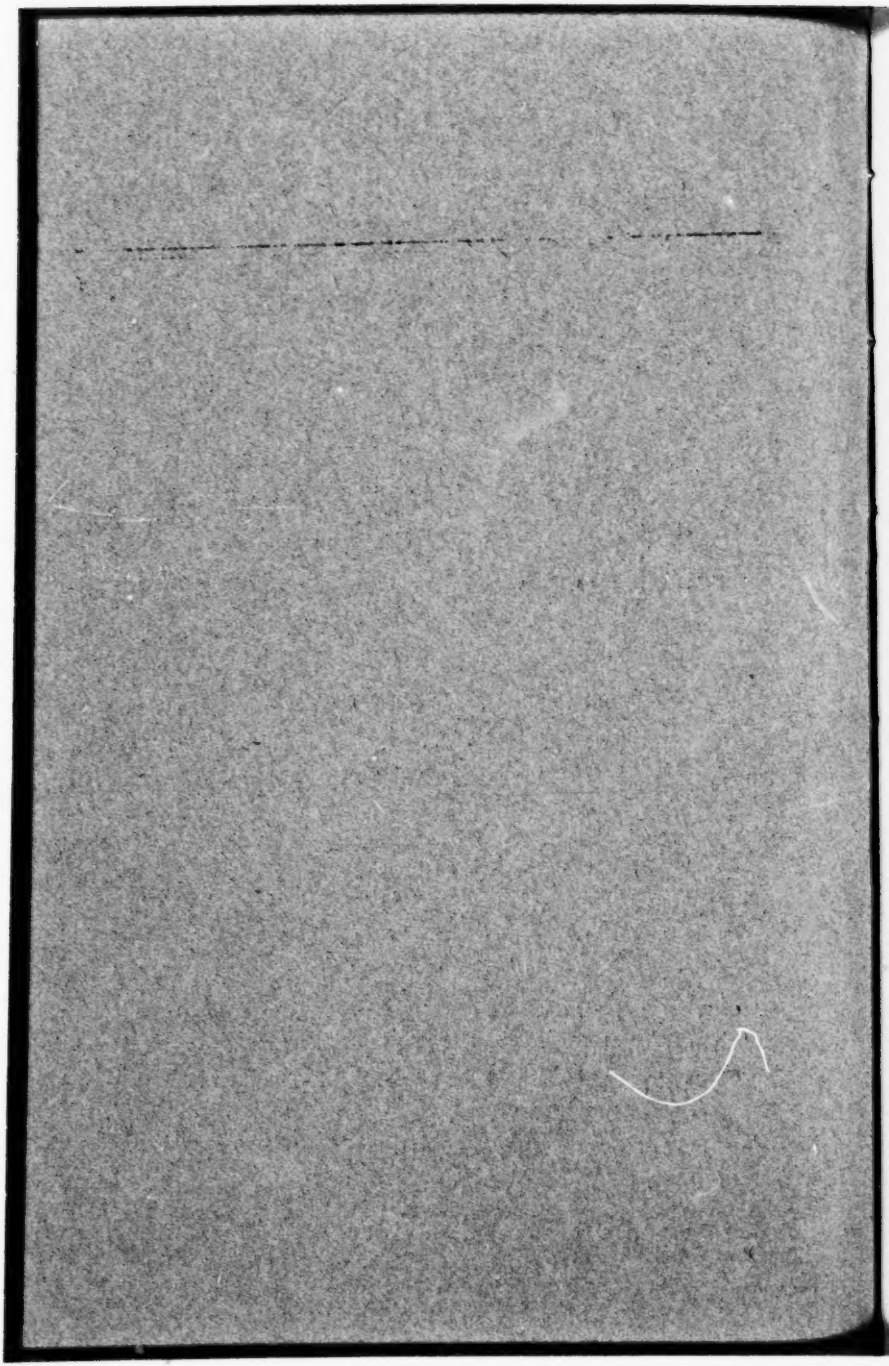

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 11, 1927

[fol. 1]

IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

LUCY B. BROOKE, Plaintiff,

v.

CITY OF NORFOLK, a Municipal Corporation, et als., Defendants

PETITION FOR WRIT OF ERROR

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Lucy B. Brooke, widow of D. Tucker Brooke, deceased, respectfully represents that she is aggrieved by a judgment of the Corporation Court of the City of Norfolk, entered on the 20th day of November, in the year 1926, in consolidated proceedings instituted by your petitioner against the City of Norfolk and others for the purpose of having corrected certain erroneous assessments of personal property for taxation, by which said judgment your petitioner was denied the relief sought. A transcript of the record in the said consolidated proceedings is herewith filed and is prayed to be taken and read as a part hereof.

[fol. 2] Statement of the Case

The record in the case is very brief, consisting merely of two applications made by Mrs. Brooke for the correction of erroneous assessment of taxes and the returns and orders thereon. The judgment, found at page 15 of the typewritten transcript and subsequent pages, recites that the two proceedings involve identical question of fact and law except in the matter of the years for which the assessments were prayed to be corrected, and consolidates the two proceedings. It further shows that the Commissioner of the Revenue and the Examiner of Records, the two officers making the assessments complained of, were examined touching the applications and testified that the matters of facts set

up in the applications were true, but that in their judgment the conclusions sought to be drawn from the facts by Mrs. Brooke were incorrectly drawn. The case, therefore, while not standing upon a technical demurrer, is yet presented to the court as though upon a demurrer to the allegations of the applications.

From the applications it appears that prior to January 28, 1914, Eliza Andrews, who for many years prior to her death was a citizen and resident of the City of Baltimore, [fol. 3] had made a will, which was duly probated in the proper court of Maryland, and was, on the 28th day of January, 1914, admitted to probate in the Corporation Court of the City of Norfolk, as a foreign will. By the terms of this will Miss Andrews gave and bequeathed to the Safe Deposit and Trust Company of Baltimore the sum of Eighty Thousand Dollars ($80,000) in trust to pay the net income to Mrs. Brooke for her life, and after her death to pay one-fifth of the income to each of Mrs. Brooke's five daughters, and, after certain trusts not necessary to be here set forth, upon the death of the last survivor of the daughters, to divide the principal between the descendants of the daughters per stirpes. It further appears that this bequest has been complied with by the delivery to the Safe Deposit and Trust Company of Baltimore as trustee of the property mentioned in the will; that the said company as trustee has ever since held the property so delivered to it in the State of Maryland, and City of Baltimore; that the property has never been in the City of Norfolk or anywhere else than in Baltimore; that the property has been continuously taxed in the State of Maryland and City of Baltimore and the tax paid by the trustee; that Mrs. Brooke is ignorant as to the nature of the property in which the fund is invested, and neither has exercised any control over the property, nor [fol. 4] has any authority to direct the investment thereof, nor to dispose of it; that Mrs. Brooke cannot call the trustee to account for any of its acts as trustee in any court in the State of Virginia, and that no process of any court in the State of Virginia can reach or touch the property or the trustee; that the trustee refuses to recognize as valid any tax levied on the property by the State of Virginia or any municipality thereof; and that though requested by Mrs.

Brooke to join in these proceedings, the trustee has refused to do anything whatever in the matter.

The applications further show that Mrs. Brooke has regularly returned her income from the property to the State of Virginia for taxation, and the thing complained of is the imposition of taxes by the State of Virginia and by the City of Norfolk upon the corpus of the estate.

The applications set forth that the imposition of the taxes on the corpus in the hands of Mrs. Brooke is in contravention of the fourteenth amendment of the Constitution of the United States; and it is expressly stipulated, as recited in the order (Transcript p. 17), that if the assessments in question are in contravention of the Constitution of the United States the relief prayed for should be granted. [fol. 5] Your petitioner, accordingly, assigns as error the action of the Court in entering judgment denying to your petitioner the relief so prayed for.

The case then presents sharply for decision the question whether a state or any political subdivision thereof can consistently with the provisions of the fourteenth amendment, tax to a resident beneficiary for life, the principal of a trust estate created by a non-resident, in favor of a non-resident trustee, the subject matter of the trust being held by the non-resident trustee outside of the estate free from control of the resident beneficiary and without accountability to the resident beneficiary in any of the courts of the state, the subject matter of the trust thus receiving no protection from the state, or any political subdivision thereof, or by reason of its laws.

Discussion

It is Mrs. Brooke's contention that the question just stated is answered in the negative by certain recent decisions of the Supreme Court of the United States hereafter to be discussed.

It may frankly be conceded that several decisions of this court appear to point to a contrary conclusion, although it [fol. 6] may be doubted whether in any of those cases quite as strong a combination of facts from the standpoint of the taxpayer was shown to exist as in the present instance. We take leave briefly to review the Virginia decisions and

shall then discuss the matter in the light of the decisions of the Supreme Court of the United States above referred to, which were made after the latest of the Virginia cases bearing on the subject.

In Selden v. Brooke, (1906), 104 Va. 832, the question was as to the validity of taxes assessed by the City of Norfolk upon a trust fund consisting of intangible property in the hands of a non-resident trustee, in the income from which a resident beneficiary had a life estate. The trustee was there appointed by decree of the Corporation Court of the City of Norfolk, which had jurisdiction over the fund. It was held that the fund was taxable in Virginia. It is quite apparent that the fact that the fund was created in Virginia was not without its effect on the minds of the court, for in deciding the case the court pointed out that if the domicile of a non-resident trustee were to fix the situs of intangible property for taxation, there would be afforded a "ready means of escape from taxation". A quite different situation exists in the present case where the fund prior to the creation of the trust was never in Virginia, [fol. 7] where there is no control of it by any court in Virginia, and where consequently no question of "escaping" from taxation arises, but the question is whether the existence of a Virginia beneficiary is to have the effect of making that taxable by the state which was not taxable before.

The point under the Federal constitution which we shall urge here does not seem to have been presented in the case under consideration. The court said:

"The contention that the construction indicated would render the statute unconstitutional, proceeds upon the hypothesis that the tax is against the non-resident trustee, whereas he is personally unaffected by the imposition, and is but the conduit through the medium of which the tax upon the property of a citizen passes into the State treasury."

We are not proceeding here on the hypothesis that the tax is unconstitutional because it is against a non-resident trustee, but, as will be hereafter shown, upon the hypothesis that it is unconstitutional because the thing taxed is not within the jurisdiction of the state.

So also in Wise v. Commonwealth (1918), 122 Va. 693, the fund from which the trust was created originated in Virginia and was made the subject of a trust in favor of a non-[fol. 8] resident trustee, but having some Virginia beneficiaries. This circumstance, again, seems to have affected the court in holding the trust fund subject to taxation in Virginia. The Court said:

"If it were otherwise, citizens of this state could, by creating foreign trusts, deprive the state of a very large part of its revenue."

In Franklin Trust Co. v. Booker (1918), 122 Va. 680, however, a case was presented where the fund itself had never been within the state. The constitutional point upon which we rely does not, from the report of the case, appear to have been distinctly presented; and the court held the fund taxable upon the authority of a simple reference to the Wise case just discussed.

Likewise, in Ellett v. Commonweath (1922), 132 Va. 136, on a state of facts apparently identical with that in the Booker case, this court in a per curiam opinion held the fund taxable, contenting itself with a mere citation of the cases discussed above.

As intimated at the outset of this discussion, the present case exhibits certain characteristics of fact which do not appear to have existed in the cases reviewed. For example, it does not appear from them that the trust had been subjected to taxation by the state in which it was held. In some of [fol. 9] the cases the fund originated in Virginia. In none of them does the constitutional point appear to have been made which we now present to the court.

That point may be stated thus: That a state can tax only that property of which it has jurisdiction; that it has jurisdiction only of such property as is within the state; that the only theory upon which intangible personal property physically located outside of the state can be held to be within its jurisdiction is that the situs of that property is the domicile of the owner, in accordance with the maxim mobilia sequuntus personam; that this maxim is but a maxim of convenience, based upon the owner's presumed dominion over the property, and embodies a legal fiction which yields to the fact in any case where the

fact can be made indubitably to appear; that the fiction has so yielded to fact in the matter of tangible personal property; and that it must likewise yield to fact in the case of tangible personal property where the manner in which that property is held is such as to exclude the possibility of the dominion over it of the person beneficially interested, and consequently the hypothesis that its situs is or can be at that person's domicile; and that if, as the Supreme Court of the United States has held, tangible personal property habitually kept by the owner outside of the state of his domicile is not subject to taxation in that state, al- [fol. 10] though it would be at any time within the power of the owner to bring that property into the jurisdiction of the state, there is far more reason for holding that intangible personal property which is located without the state and which the person benficially interested could not, even if he wanted to, possibly bring within the state, is not subject to taxation by the state of that person's domicile.

In Frick v. Pennsylvania (1925), 268 U. S. 473, 69 L. Ed. 1058, one of the important questions was whether the art collections of the late Henry C. Frick, a citizen of Pennsylvania, which Mr. Frick kept in the City of New York, were subject to a tax imposed by the State of Pennsylvania on the transfer of property by will or intestate. It was held that such property was not so taxable.

In reviewing the former decisions of the Supreme Court bearing on the subject, that court said (268 U. S. at pages 488-9, 69 L. Ed. at page 1062):

"These decisions show, first, that the exaction by a state of a tax which it is without power to impose is a taking of property without due process of law, in violation of the 14th Amendment; secondly, that while a state may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extra ter- [fol. 11] ritorial operation; and, thirdly, that, as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicil of the owner. Cleveland, P. & A. R. Co. v. Pennsylvania, 15 Wall. 300, 319, 325, 21 L. Ed. 179, 186, 188; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 396, 47 L. Ed.

513, 518, 23 Sup. Ct. Rep. 463; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 49 L. Ed. 1059, 25 Sup. Ct. Rep. 686, 3 Ann. Cas. 1100; Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 356, 49 L. Ed. 1077, 1083, 25 Sup. Ct. Rep. 669; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 38, 54 L. Ed. 366, 370, 30 Sup. Ct. Rep. 190; International Paper Co. v. Massachusetts, 246 U. S. 135, 142, — L. Ed. 624, 629, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918 C, 617."

Among the decisions of the Supreme Court holding tangible personal property permanently located outside the state to be nontaxable, are Delaware, etc. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, dealing with the tax upon the value of capital stock represented in part by assets (in that case, coal which had been mined) outside the state; and Union Refrigerator etc. Co. v. Kentucky, 199 U. S. 194, 50 L. Ed. 150, involving the tax on refrigerator cars permanently located outside the state. [fol. 12] In the latter of those cases the court said:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land, which, to be taxable, must be within the limits of the state. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state, *must* less where such action has been defened by any court. It is said by this court in the Foreign-held Bond Case, 15 Wall. 300, 319, 21 L. Ed. 179, 186, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which her taxing power can be legitimately exercised. The argument against the taxability of land within the jurisdiction of another state applies with equal cogency to tangible personal property beyond the jurisdiction. It is

not beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws."

So, too, in Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, at page 22, L. Ed. 613, at page 616, the Court said:

[fol. 13] "No general principles of law are better settled, or more fundamental, than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the laws of any other state. The old rule expressed in the maxim 'mobilia sequunter personam', by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the lex situs,—the law os the place where the property is kept and used."

It is quite true that in several of these and other cases decided by the Supreme Court of the United States, a distinction is drawn between tangible personal property and intangible personal property where the latter is under the absolute control of the owner, but the decisions clearly indicate that when a case shall be presented in which the actual situs of intangible personal property is fixed by the instrument under which it is held—as for example in the case of the creation of a trust—the court will hold intangible [fol. 14] property so situated to be clearly without the jurisdiction of a state other than that in which the property is held, and in which only it can legally be held.

Such a situation was presented to the Supreme Court very recently in the case of Wachovia, etc. Co. v. Doughton, decided November 29, 1926 (Adv. Ops. 15, 1926, 250). In that case, a resident of Massachusetts gave by will to the Springfield Safe Deposit & Trust Company, a corporation of Massachusetts, a certain estate in trust, the net income from one-half of which was to be paid to his daughter during her life and at her death to be transferred to such persons as she might appoint, or in default of payment to her

issue. The daughter, after her father's death, resided in North Carolina where she died in 1921 leaving an infant child and a will by which she directed that the property so in the hands of the Springfield Safe Deposit & Trust Company should be divided between her husband and child. A statute of North Carolina directed that the transfer of all property passing by will or intestate laws should be subject to a tax, and that the exercise of the power of appointment should be deemed a transfer taxable under the provisions of the act, in the same way as though the property to which the appointment related had belonged to the donee of [fol. 15] the power and had been disposed of by will. In deciding that the estate in question was not subject to transfer tax by North Carolina, the court said:

"We think the assets of the trust estate established by the will of Haynes had no situs, actual or constructive, in North Carolina. The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the state where Mrs. Taylor happened to have her domicil. No right exercised by the donee was conferred on her by North Carolina A state may not subject to taxation things wholly beyond her jurisdiction or control. Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603.

It would be easy to multiply the citation of cases illustrating and emphasizing the point here relied upon, but your petitioner has felt that the cases of Frick v. Pennsylvania, supra, and Wachovia, etc. Co. v. Doughton, supra, both decided by the Supreme Court after the latest opportunity offered this court of passing upon the question—although, we repeat, the constitutional question presented by us does not appear to have been distinctly before this court—so effectively meet the situation as not to justify a more extended treatment.

[fol. 16] Conclusion

The judgment of the lower court should be reversed.

For these and other errors apparent on the fact of the record, your petitioner prays that a writ of error may be awarded her to the judgment hereinabove complained of.

Lucy B. Brooke, by Nath'l T. Green, Robt. B. Tunstall, Counsel.

We, Nathaniel T. Green and Robt. B. Tunstall, counsel practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in our judgment it is proper that the judgment hereinabove complained of should be reviewed by this honorable court.

Nath'l T. Green, Robt. B. Tunstall.

Received Jan. 27, 1926. H. S. J.

[fol 17] In Corporation Court of City of Norfolk

Lucy B. Brooke, Plaintiff,

against

City of Norfolk, a Municipal Corporation, etc., Defendants

Application for Correction of Erroneous Assessments—Filed July 31, 1925

To City of Norfolk, a Municipal Corporation, and R. W. Peatross, its Attorney; A. Plummer Pannill, Commissioner of Revenue of the City of Norfolk; Thomas H. Willcox, Jr., Commonwealth's Attorney for the City of Norfolk; W. I. Gilkerson, Examiner of Records:

Take notice that the undersigned will, at 10:00 o'clock A. M. on Friday, the 7th day of August, 1925, apply to the Corporation Court of the City of Norfolk, Virginia, for redress against, and move said Court to correct, an erroneous assessment of City taxes, in favor of the City of Norfolk, [fol. 18] against her, and to that end alleges that she is aggrieved by an entry in the Personal Property Book, made for the year 1923, at page 417, line number 17, of said book, whereby the undersigned is charged with One Hundred and Thirty-one Dollars and Eighty-four Cents ($131.84) City taxes, in favor of the City of Norfolk, for the year 1923, on bonds, notes and other evidences of debt shown thereby to be assessed at the sum of Sixty-five Thousand Nine Hundred Twenty ($65,920.00) Dollars, which said assessment of said bonds, notes and other evidences of debt, for said year, was made by W. I. Gilkerson, Examiner of Records, and as grounds for this application, the undersigned alleges the following facts:

First. Some time prior to the 28th day of January, 1914, one Eliza Andrews, who at the time of her death, and for many years prior thereto, was a citizen and resident of the City of Baltimore, in the State of Maryland, made a certain will and testament, by the seventeenth item of which she made the following bequest, under which the undersigned took certain interests as is therein set forth.

"Item 17. I give and bequeath to the Safe Deposit and Trust Company of Baltimore the sum of Eighty Thousand [fol. 19] Dollars ($80,000) in trust, however, to pay the net income to Mrs. Lucy Brooke, wife of D. Tucker Brooke, for and during the term of her natural life, and after her death to pay one-fifth of said net income to each of her daughters, to-wit: Lucy, Eloise, May, Lena and Marguerita during their respective lives, upon the death of any of said daughters without issue living at the time of her death, then the income payable to any such daughter to be paid in equal parts to her surviving sisters and the children of any deceased sister, the children of any deceased sister to take as a class the share which their mother would have taken if living, but upon the death of any of said daughters of said Lucy Brooke leaving issue living at the time of her death, then the income theretofore payable to said daughter shall be paid to her issue equally; all the aforesaid payments of income to continue until the death of the last survivor of the daughters of said Lucy Brooke; and upon the death of said last survivor, the trustee shall divide the said principal, to-wit, the said eighty thousand dollars ($80,000) between the descendants then living of the daughters of said Lucy Brooke per stirpes."

Second. That the said will of the said Eliza Andrews [fol. 20] was duly probated in the proper court of the State of Maryland as her last will and testament, and was subsequently, on the 28th day of January, 1914, admitted to probate in this Court as a foreign will, and recorded as such in Will Book No. 13 of the records of this Court.

Third. That the Safe Deposit and Trust Company of Baltimore, named as Trustee, in Item 17 of the will above mentioned, is a corporation of the State of Maryland, and that there was delivered to it, as Trustee, in the State of Maryland, the property and estate mentioned and de-

scribed in said Item 17 of said will shortly after the death of the testator, Eliza Andrews, and that said Safe Deposit and Trust Company of Baltimore, as such Trustee, has held said property so delivered to it, or the investments made therefrom by it, in said State of Maryland, and in said City of Baltimore, as said Trustee, ever since the delivery of said property to it, and that said property has never, at any time, since said delivery been in the State of Virginia, or the City of Norfolk, Virginia, or anywhere else than in the City of Baltimore, Maryland, and no part of said property is invested in Virginia, or in loans made in Virginia, or in the stock or bonds of any corporation existing under the laws of Virginia.

[fol. 21] Fourth. That the property so delivered to the said Safe Deposit and Trust Company of Baltimore has, ever since said delivery, been taxed in the State of Maryland, and the City of Baltimore, and that the taxes thereon have been paid by said Safe Deposit and Trust Company of Baltimore, which holds the same as Trustee.

Fifth. That there has been paid to the undersigned by said Safe Deposit and Trust Company of Baltimore, as Trustee, the net income derived from said property ever since its delivery to said Trustee, as provided in Item 17 aforesaid of the will of Eliza Andrews, and this income has been duly and properly returned by the undersigned for taxation in the State of Virginia, and the taxes on said income have been duly paid by the undersigned.

Sixth. That the undersigned is ignorant as to what is the nature of the property in which the fund held by said Safe Deposit and Trust Company of Baltimore, as Trustee, under said Item 17 of the said will is invested; that she has and exercises no control whatsoever over the property so held by said Safe Deposit and Trust Company of Baltimore, and has no authority to direct the investment of the same, and has no right to dispose of the same, and cannot, in the Courts of this Commonwealth, call said Trustee to account, or cause it to account for any of its acts as said [fol. 22] Trustee; and that the State of Virginia itself has no jurisdiction over said Trustee, or over said property, and no process of any of its Courts, or of any of its Departments, can reach or touch said property or said Trus-

tee, and that the City of Norfolk is likewise without jurisdiction of said fund or said Trustee; and the said Trustee refused to recognize as valid any tax levied or assessed on said property so held by it as Trustee by either the State of Virginia, or any of the municipalities thereof, and, though requested by the undersigned to join in proceedings, of the kind now instituted by the undersigned, has refused to do anything whatever in said matter.

Seventh. That despite the facts above set forth, the Examiner of Records assessed against the undersigned for taxation all of the corpus of the property so held by the said Safe Deposit and Trust Company of Baltimore, as Trustee, under said Item 17 of the will of Eliza Andrews, said assessment being the identical and same assessment sought herein to be corrected, and against which the undersigned hereby seeks redress, it being the same assessment hereinabove first mentioned and complained of, and there being no dispute or contention as to that fact.

Eighth. That, as will appear from said Item 17 of the [fol. 23] said will, the undersigned has no vested interest in the property passing thereby, and has only the right to the income therefrom during her life, and that she is charged with no duty relative to the preservation of the corpus of said property, but that this duty is on the Trustee, which holds the same, and that said property receives no protection whatsoever from the State of Virginia, or the City of Norfolk, or by reason of the laws thereof.

Ninth. That the undersigned alleges that the said assessment against her is illegal, null and void, as are the taxes charged against her by reason thereof, and particularly does she charge that said assessment and the taxes charged against her by reason thereof, are contrary to the Constitution of the United States, and especially the provisions of the Fourteenth Amendment thereof, in that it deprives her of her property without due process of law, by reason of the fact that it attempts to compel her to pay taxes, and causes her to be charged with taxes, on property which she does not own, and over which she has no control or authority; and further violates the Constitution of the United States, and the Fourteenth Amendment thereof, in that it denies her the equal protection of

the laws of the State of Virginia, by reason of the fact that she would thereby be compelled to pay taxes on prop-
[fol. 24] erty which she does not own, and over which she has no control, while other citizens of the State of Virginia are only properly taxed on property owned by them, except where the same situation exists as is the case with the undersigned.

The undersigned, therefore, applies to the Court, and moves it that it may correct and strike out the illegal assessment and charge of taxes against her aforesaid, and that she may be granted the proper redress herein against the same, and may be relieved from the payment of said taxes now, or in the future.

And she will ever pray.

Lucy B. Brooke, by Nath'l T. Green, Her Attorney.

Return

We accept service of this notice, this 27th day of July, 1925.

City of Norfolk, by R. W. Peatross, Its Attorney.
R. W. Peatross, Attorney for the City of Norfolk.
[fol. 25] A. Plummer Pannill, Commr. of the Revenue of the City of Norfolk. T. H. Willcox, Jr., Commonwealth's Attorney of the City of Norfolk. W. I. Gilkeson, Examiner of Records.

In Corporation Court of City of Norfolk

Submission of Cause—August 7, 1925

This day came the plaintiff, Lucy B. Brooke, and the defendants, City of Norfolk, R. W. Peatross, its Attorney, A. Plummer Pannill, Commissioner of the Revenue of the City of Norfolk, Thomas H. Willcox, Jr., Commonwealth's Attorney for the City of Norfolk, and W. I. Gilkerson, Examiner of Records, and the said Lucy B. Brooke applied to this Court for redress against, and moved this Court to correct the erroneous assessment of the City taxes, in favor of the City of Norfolk against her, mentioned in the notice of this application, and motion which has been

duly served upon all of said parties, and which is this day duly filed, and to said application and motion all of [fol. 26] said parties named as defendants herein appeared, and the same is thereupon duly docketed. And the Court not yet being advised as to its judgment upon said application, does continue the hearing of the same until a future term of this Court.

IN CORPORATION COURT OF CITY OF NORFOLK

APPLICATION FOR CORRECTION OF ERRONEOUS ASSESSMENTS—
Filed August 2, 1926

To City of Norfolk, a Municipal Corporation, and R. W. Peatross, its Attorney; A. Plummer Pannill, Commissioner of Revenue of the City of Norfolk; Harry E. McCoy, Commonwealth Attorney of the City of Norfolk, and W. I. Gilkeson, Examiner of Records:

Take notice, that the undersigned will, at 10 o'clock A. M., on Monday, the 2nd day of August, 1926, apply to the Corporation Court of the City of Norfolk, Virginia, for redress against, and move said court to correct, certain erroneous assessments of City and State taxes against her, and to that end the undersigned alleges that she is aggrieved by an entry in the personal property book made for the year 1924, at page 301, line 19, whereby the undersigned is charged with One Hundred and Thirty-one [fol. 27] Dollars and Eighty-four Cents ($131.84) for City taxes in favor of the City of Norfolk, and Two Hundred and Thirty Dollars and Seventy Cents ($230.70) for state taxes, both for the year 1924, and also by an entry in the personal property book made for the year 1925, at page 370, line 19, of said book, whereby the undersigned is charged with One Hundred and Thirty-One Dollars and Eighty-four Cents ($131.84) City taxes in favor of the City of Norfolk, and Two Hundred and Thirty Dollars and Seventy-two Cents ($230.72) state taxes for the year 1925; both of the said assessments being made on and in respect of bonds, notes and other evidences of debt shown thereby to be assessed at the sum of Sixty-five Thousand, Nine Hundred and Twenty Dollars ($65,920),

which said assessments of said bonds, notes and other evidences of debt for the said years 1924 and 1925, respectively, were made by A. Plummer Pannill, Commissioner of the Revenue for the City of Norfolk. And as grounds for this application the undersigned alleges the following facts:

First. Some time prior to the 28th day of January, 1914, one Eliza Andrews, who at the time of her death, and for many years prior thereto, was a citizen and resident of the City of Baltimore, in the State of Maryland, made a certain will and testament, by the seventeenth Item of which she made the following bequest, under which the [fol. 28] undersigned took certain interests as is therein set forth:

"Item 17. I give and bequeath to the Safe Deposit and Trust Company of Baltimore the sum of Eighty Thousand Dollars ($80,000) in trust, however, to pay the net income to Mrs. Lucy Brooke, wife of D. Tucker Brooke, for and during the term of her natural life, and after her death to pay one-fifth of said net income to each of her daughters, to-wit: Lucy, Eloise, May, Lena and Marguerita during their respective lives, and upon the death of any of said daughters without issue living at the time of her death, then the income payable to any such daughter to be paid in equal parts to her surviving sisters, and the children of any deceased sister, the children of any deceased sister to take as a class the share which their mother would have taken if living, but upon the death of any of said daughters of said Lucy Brooke leaving issue living at the time of her death, then the income theretofore payable to said daughter shall be paid to her issue equally; all the aforesaid payments of income to continue until the death of the last survivor of the daughters of said Lucy Brooke; and upon the death of said last survivor, the trustee shall divide the said principal, to-wit, the said eighty thousand dollars ($80,000) between the descendants [fol. 29] then living of the daughters of said Lucy Brooke per stirpes."

Second. That the said will of the said Eliza Andrews was duly probated in the proper Court of the State of Maryland as her last will and testament, and was sub-

sequently, on the 28th day of January, 1914, admitted to probate in this Court as a foreign will, and recorded as such in Will Book No. 13 of the records of this Court.

Third. That the Safe Deposit and Trust Company of Baltimore, named as Trustee, in Item 17 of the will above mentioned, is a Corporation of the State of Maryland, and that there was delivered to it, as Trustee, in the State of Maryland, the property and estate mentioned and described in said Item 17 of said will shortly after the death of the testator, Eliza Andrews, and that said Safe Deposit and Trust Company of Baltimore, as such Trustee, has held said property so delivered to it, or the investments made therefrom by it, in said State of Maryland, and in said City of Baltimore, as said Trustee, ever since the delivery of said property to it, and that said property has never, at any time, since said delivery, been in the State of Virginia, or the City of Norfolk, Virginia, or anywhere else than in the City of Baltimore, Maryland.

[fol. 30] Fourth. That the property so delivered to the said Safe Deposit and Trust Company of Baltimore has, ever since said delivery, been taxed in the State of Maryland, and City of Baltimore, and that the taxes thereon have been paid by said Safe Deposit and Trust Company of Baltimore, which holds the same as Trustee.

Fifth. That there has been paid to the undersigned by said Safe Deposit and Trust Company of Baltimore, as Trustee, the net income derived from said property ever since its delivery to said Trustee, as provided in Item 17 aforesaid of the will of Eliza Andrews, and this income has been duly and properly returned by the undersigned for taxation in the State of Virginia, and the taxes on said income have been duly paid by the undersigned.

Sixth. That the undersigned is ignorant, except as above set forth, as to what is the nature of the property in which the fund held by said Safe Deposit and Trust Company of Baltimore, as Trustee, under said Item 17 of the said will is invested; that she has and exercises no control whatsoever over the property so held by said Safe Deposit and Trust Company of Baltimore, and has no authority to direct the investment of the same, and has no right to dis-

pose of the same, and cannot, in the Courts of this Commonwealth, call said Trustee to account, or cause it to [fol. 31] account for any of its acts as said Trustee; and that the State of Virginia itself has no jurisdiction over said Trustee, or over said property, and no process of any of its Courts, or of any of its Departments, can reach or touch said property or said Trustee, and that the City of Norfolk is likewise without jurisdiction of said fund or said Trustee; and the said Trustee refuses to recognize as valid any tax levied or assessed on said property so held by it as Trustee by either the State of Virginia, or any of the municipalities thereof, and, though requested by the undersigned to join in proceedings of the kind now instituted by the undersigned, has refused to do anything whatever in said matter.

Seventh. That despite the facts above set forth, the said A. Plummer Pannill, Commissioner of the Revenue, has assessed for the years 1924 and 1925 as aforesaid, against the undersigned for taxation all of the corpus of the property so held by the said Safe Deposit and Trust Company of Baltimore, as Trustee, under said Item 17 of the will of Eliza Andrews, said assessments being the identical and same assessments sought herein to be corrected, and against which the undersigned hereby seeks redress.

Eighth. That, as will appear from said Item 17 of the [fol. 32] said will, the undersigned has no vested interest in the property passing thereby, and has only the right to the income therefrom during her life, and that she is charged with no duty relative to the preservation of the corpus of said property, but that this duty is on the Trustee, which holds the same, and that said property receives no protection whatsoever from the State of Virginia, or the City of Norfolk, or by reason of the laws thereof.

Ninth. That the said assessments against her are illegal, null and void, as are the taxes charged against her by reason thereof, and particularly the undersigned charges that said assessments and the taxes charged against her by reason thereof, are contrary to the Constitution of the United States, and especially the provisions of the Fourteenth Amendment thereof, in that it deprives her of her property without due process of law, by reason of the fact

that it attempts to compel her to pay taxes, and causes her to be charged with taxes, on property which she does not own, and over which she has no control or authority, and over which neither the State of Virginia nor the City of Norfolk has any jurisdiction or power; and further violates the Constitution of the United States, and the Fourteenth Amendment thereof, in that it denies her the equal protec-
[fol. 33] tion of the laws of the State of Virginia, by reason of the fact that she would thereby be compelled to pay taxes on property which she does not own, and over which she has no control, and over which neither the State of Virginia nor City of Norfolk has any jurisdiction and power, while other citizens of the State of Virginia are only properly taxed on property owned by them and over which the State of Virginia has jurisdiction and power, except where the same situation exists as is the case with the undersigned.

The undersigned, therefore, applies to the Court, and moves it that it may correct and strike out the illegal assessment and charge of taxes against her aforesaid, and that she may be granted the proper redress herein against the same, and may be relieved from the payment of said taxes now, or in the future.

And she will ever pray.

Lucy B. Brooke, by Robt. B. Tunstall, Attorney.

Executed this 31st July, 1926, by delivering a copy of the within to E. Jeff Roberson, Counselman of City of Norfolk, Va., a Corporation, in the City of Norfolk, wherein he resides and wherein the said Corporation is doing business.

C. H. Tumbleson, City Sergeant, City of Norfolk, by
[fol. 34] Wm. Carmine, Deputy.

Executed in the City of Norfolk, Va., this the 31st day of July, 1926, by serving a Copy hereof on Harry E. McCoy, Commonwealth Attny., City of Norfolk, in person.

C. H. Tumbleson, Sergt. City of Norfolk, Va., by W. Carmine, Deputy.

Executed in the City of Norfolk, Va., this the 31st day of July, 1926, by serving a Copy hereof on W. I. Gilkeson, in person.

C. H. Tumbleson, Sergt. City of Norfolk, Va., by W. Carmine, Deputy.

Executed in the City of Norfolk, Va., this the 31 day of July, 1926, by serving a Copy hereof on A. Plummer Pannill, in person.

C. H. Tumbleson, Sergt. City of Norfolk, Va., by C. B. Lesner, Deputy.

[fol. 35] IN CORPORATION COURT OF CITY OF NORFOLK

ORDER SUBSTITUTING PARTY DEFENDANT AND CONSOLIDATING CAUSES—November 20, 1926

This day came Lucy B. Brooke, by counsel, and representing that the proceeding initiated by notice given by her to the City of Norfolk, a municipal corporation, and R. W. Peatross, its attorney, A. Plummer Pannill, Commissioner of the Revenue of the City of Norfolk, Thomas H. Willcox, Jr., Commonwealth's Attorney of the City of Norfolk and W. I. Gilkeson, Examiner of Records, which proceeding was made returnable on the 7th day of August, 1925, and that certain other proceeding instituted by her in this Court, initiated by notice to the City of Norfolk, a municipal corporation, and R. W. Peatross, its attorney, A. Plummer Pannill, Commissioner of the Revenue, of the City of Norfolk, Harry E. McCoy, Commonwealth's Attorney of the City of Norfolk, and W. I. Gilkeson, Examiner of Records, which latter proceeding was made returnable to the second day of August, 1926, involved identical questions of fact and of law (save as to the matter of facts the years for which her assessments are prayed to be corrected) and further representing that since the institution of the first named proceeding Thomas H. Willcox, Jr., therein named as Commonwealth's Attorney of the City of Norfolk has been succeeded by Harry E. McCoy, who is now Commonwealth's Attorney of the City of Norfolk, moved the Court, first, that the said Harry E. McCoy, [fol. 36] Commonwealth's Attorney as aforesaid, be substituted for Thomas H. Willcox, Jr., named in the first proceedings as Commonwealth's Attorney of the City of Norfolk, and secondly, that the said two proceedings be consolidated; and no objection being made by any of the defendants to either of said motions, the same are granted and

the said Harry E. McCoy, now Commonwealth's Attorney of the City of Norfolk, is substituted for Thomas H. Willcox, Jr., his predecessor in office, and the two said proceedings are hereby consolidated and directed hereafter to be proceeded in together; and the said Harry E. McCoy accordingly proceeded to defend against the petitions so filed in the said consolidated cause.

In Corporation Court of City of Norfolk

Stipulation as to Cause—November 20, 1926

And thereupon A. Plummer Pannill, Commissioner of the Revenue of the City of Norfolk, and W. I. Gilkeson, Examiner of Records, the two officers making the assessments complained of, were examined touching the said applications and testified that the matters and things set up in each of the said applications so filed by the plaintiff were true, but that in their judgment the conclusions sought to be drawn from the said facts by the said plaintiff, Lucy B. Brooke, were incorrectly drawn, and the parties further stipulated and agreed that if the assessments complained of were in contravention of the Constitution of the United [fol. 37] States, the relief prayed for should be granted, and the Court certifies that these were all the matters proved in the case.

In Corporation Court of City of Norfolk

Judgment—November 20, 1926

And thereupon the Court, taking into consideration the facts proved and certified as aforesaid, overruled the contentions of the plaintiff, especially as set forth in the ninth paragraph of each of the plaintiff's applications made as aforesaid, to the effect that the said assessments were illegal, null and void, and particularly the contentions that the assessments and taxes charged against the plaintiff by reason thereof were made and charged contrary to the Constitution of the United States, and especially the provisions of the fourteenth amendment thereof, in that the

said assessments and the taxes charged against the plaintiff by reason thereof deprived the plaintiff of her property without due process of law and denied her the equal protection of the laws and overruled any and all other contentions of the plaintiff based upon the Constitution of the United States; and the Court further acting under the authority of the case of Ellett v. Commonwealth, reported in Volume 132 of the Virginia Reports, at page 136, and of the other several cases cited in the opinion thereto filed, denied the said applications of the said plaintiff, and each [fol. 38] of them, and refused to correct and strike out the assessments and charges of taxes claimed by the plaintiff to have been illegally made.

IN CORPORATION COURT OF CITY OF NORFOLK

ORDER SUSPENDING EXECUTION—November 20, 1926

But on motion of the plaintiff, who desires to present to the Supreme Court of Appeals of Virginia a petition for a writ of error from this order, the Court doth further order that execution hereon be suspended for a period of sixty days upon the execution by the plaintiff of a bond in the sum of $500.00, secured and conditioned according to law.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 40] IN SUPREME COURT OF APPEALS OF VIRGINIA

ORDER DENYING WRIT OF ERROR—February 2, 1927

The petition of Lucy B. Brooke, widow of D. Tucker Brooke, for a writ of error to a judgment rendered by the corporation court of the city of Norfolk on the 20th day of November, 1926, in consolidated proceedings instituted by said petitioner against the City of Norfolk for the purpose of having corrected certain erroneous assessments of personal property for taxation, having been maturely con-

sidered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, the effect of which is to affirm the judgment of the said corporation court.

A Copy. Teste: H. Stewart Jones, Clerk.

[fols. 41 & 42] Clerk's certificate to foregoing transcript omitted in printing.

Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

(5560)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 6, 1927

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 6, 1927.

(6635)

APR 25 1927
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted] 229

LUCY B. BROOKE, Petitioner,

vs.

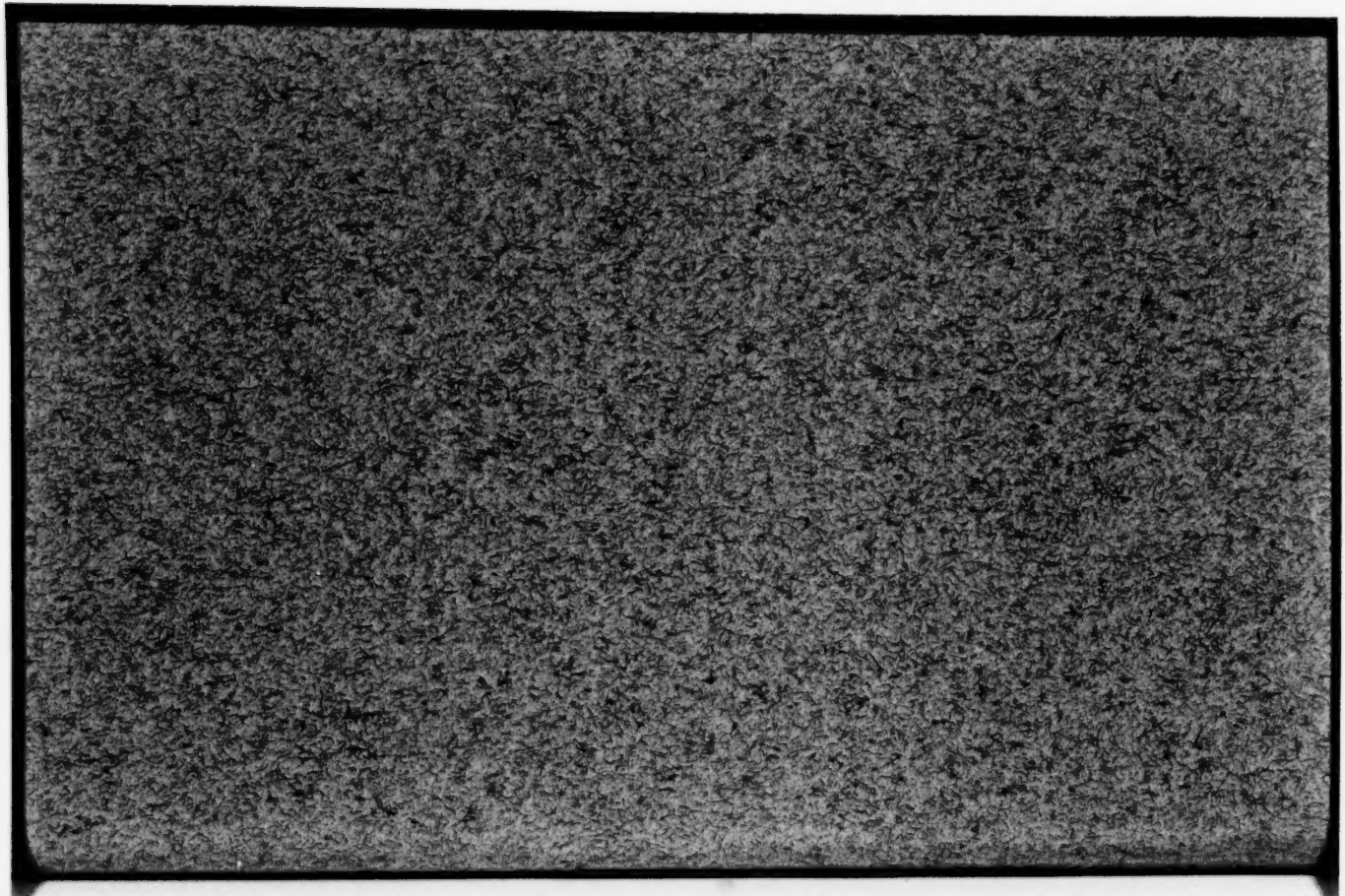
CITY OF NORFOLK, R. W. PEATROSS, A. PLUM-MER FARNELL, HARRY E. McCOY, and W. I. GILKESON.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

Filed April 25, 1927.

NATHANIEL T. GREEN,
ROBT. H. TUNSTALL,
Counsel for Petitioner.

(22,940)



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1079

LUCY B. BROOKE, PETITIONER,

vs.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, HARRY E. McCOY, AND W. I. GILKESON, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Lucy B. Brooke, respectfully shows to this Honorable Court as follows:

(1) That this is a proceeding for the correction of erroneous assessments of taxes in which the jurisdiction of this Court is invoked upon the ground that the

law of Virginia under which the said assessments were made, as interpreted by the courts of that State, takes the property of your petitioner without due process of law, and denies her the equal protection of the law, in contravention of the Fourteenth Amendment of the Constitution of the United States; the facts out of which this contention arises being as hereafter set forth.

(2) That prior to January 28, 1914, Eliza Andrews, who for many years prior to her death was a citizen and resident of the city of Baltimore, made a will, which was duly probated in the proper court of Maryland, and was, on the 28th day of January, 1914, admitted to probate in the Corporation Court of the city of Norfolk, Va., as a foreign will. By the terms of this will Miss Andrews gave and bequeathed to the Safe Deposit and Trust Company of Baltimore the sum of eighty thousand dollars ($80,000) in trust to pay the net income to your petitioner for her life, and after her death to pay one-fifth of the income to each of your petitioner's five daughters, and, after certain trusts not necessary to be here set forth, upon the death of the last survivor of the daughters, to divide the principal between the descendants of the daughters *per stirpes*.

(3) That this bequest was complied with by the delivery to the Safe Deposit and Trust Company of Baltimore as trustee of the property mentioned in the will; that the said company as trustee has ever since held the property so delivered to it in the State

of Maryland and city of Baltimore; that the property has never been in the city of Norfolk or State of Virginia or anywhere else than in Baltimore; that the property has been continuously taxed in the State of Maryland and city of Baltimore and the tax paid by the trustee; that your petitioner is ignorant as to the nature of the property in which the fund is invested, and neither has exercised any control over the property, nor has any authority to direct the investment thereof, nor to dispose of it; that your petitioner cannot call the trustee to account for any of its acts as trustee in any court in the State of Virginia, and that no process of any court in the State of Virginia can reach or touch the property of the trustee; that the trustee refuses to recognize as valid any tax levied on the property by the State of Virginia or any municipality thereof; and that though requested by your petitioner to join in these proceedings, the trustee has refused to do anything whatever in the matter.

(4) That the State of Virginia and the city of Norfolk, claiming that under and by virtue of the provisions of Section 2307 of the Code of Virginia, 1919, as variously amended (Acts of Assembly 1920, p. 563; 1922, p. 906; 1923, p. 120), the situs of the fund held by the Safe Deposit and Trust Company of Baltimore, as aforesaid, is in the city of Norfolk and State of Virginia, have assessed against your petitioner taxes against the corpus of the said fund amounting for the year 1924 to three hundred and sixty-two dollars and fifty-four cents ($362.54), and for the year 1925 to three

hundred and sixty-two dollars and fifty-six cents ($362.56).

(5) That on the 7th day of August, 1925, and on the 2d day of August, 1926, your petitioner filed in the Corporation Court of the City of Norfolk in pursuance of the statutes of Virginia in such cases made and provided, applications substantially identical except as to the year in respect to which the said taxes were assessed, alleging the facts set forth above, and further that the situs of the funds so sought to be assessed was in the State of Maryland and not in the State of Virginia, or in the City of Norfolk; and your petitioner further alleged that the attempted imposition by the State of Virginia and the City of Norfolk of taxes upon the corpus of the said fund constituted a taking of your petitioner's property without due process of law and deprives her of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, the benefit and protection of which your petitioner then and there specially set up and claimed.

(6) That by order of the said Corporation Court of the City of Norfolk entered on the 20th day of November, 1926, the said proceedings were consolidated and heard together; that it was testified therein by the officers making the assessments complained of, that the matters and things set up in each of the applications above mentioned were true; and that the case was submitted to the court solely on the constitutional question hereinabove set forth.

(7) That it was stipulated by and between the parties and so appears in the order aforesaid (R. 21), that if the assessments complained of were in contravention of the Fourteenth Amendment of the Constitution of the United States, the relief prayed for should be granted; but the said Corporation Court of the City of Norfolk, on the said 20th day of November, 1926, overruled the contention of your petitioner that the said assessments were illegal, null and void, and overruled particularly and expressly the contention of your petitioner that the said assessments and the tax charged in pursuance thereof, were made and charged contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and entered an order sustaining the said assessments.

(8) That thereafter your petitioner on, to-wit: the 27th day of January, 1927, filed her petition in the Supreme Court of Appeals of Virginia praying that that court allow a writ of error to the judgment of the Corporation Court of the City of Norfolk, entered as aforesaid, but on the 2d day of February, 1927, the said Supreme Court of Appeals of Virginia entered its order reciting that in its opinion that the said judgment of the Corporation Court of the City of Norfolk was plainly right, and rejecting the petition for a writ of error, and the said court expressly affirmed the judgment of the Corporation Court of the City of Norfolk (R. 22).

(9) That the said judgment of the Supreme Court of Appeals of Virginia is a judgment of the highest court

of the State of Virginia in which a decision in the suit could be had, and that there was drawn in question, as above set forth in said suit, the validity of the aforesaid Section 2307 of the Code of Virginia of 1919 (as amended) upon the ground that the said statute as interpreted by the courts of Virginia is repugnant to the Fourteenth Amendment of the Constitution of the United States, and that there was specially set up and claimed in the said suit a title, right, privilege and immunity on behalf of your petitioner, under the said Fourteenth Amendment of the Constitution of the United States, to the benefit and protection of the said Fourteenth Amendment against the imposition of the assessments herein complained of, as aforesaid.

(10) That the said Supreme Court of Appeals of Virginia erred in rejecting your petitioner's petition for a writ of error and in affirming the judgment of the Corporation Court of the City of Norfolk as aforesaid, for the reason that the claim of your petitioner that the taxes and assessments complained of were, for the reasons above set forth, invalid and void under the Fourteenth Amendment of the Constitution of the United States, and the title, right, privilege, and immunity under the said amendment specially set up and claimed by your petitioner, as aforesaid, should have been sustained.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court direct to the Supreme Court of Ap-

peals of Virginia, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full, true and complete transcript of the record and of all proceedings of the said Supreme Court of Appeals of Virginia in the said case therein entitled Lucy B. Brooke, petitioner, *against* The City of Norfolk, R. W. Peatross, A. Plummer Pannill, Harry E. McCoy, and W. I. Gilkeson, to the end that the said cause may be reviewed and determined by this Court as provided by Section 237 of the Judicial Code of the United States as amended, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the provisions of law, and that the said judgment of the said Supreme Court of Appeals of Virginia in the said cause, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

NATH'L T. GREEN,
ROBT. B. TUNSTALL,
Attorneys for Petitioner.

STATE OF VIRGINIA,
City of Norfolk, To wit:

This day personally appeared before me, Rosa T. Bilisoly, a notary public in and for the State and city aforesaid, Nathaniel T. Green and Robt. B. Tunstall, who, being duly sworn, deposed and said that they are counsel for the above-named petitioner and that the matters and things in the foregoing petition are true,

to the best of their knowledge, information and belief.

Given under my hand and seal this 7th day of April, 1927.

[SEAL.] ROSA T. BILISOLY,
Notary Public.

We hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in our opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

NATH'L T. GREEN.
ROBT. B. TUNSTALL.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1079.

LUCY B. BROOKE, PETITIONER,

vs.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, HARRY E. McCOY, AND W. I. GILKESON, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

THE QUESTION INVOLVED.

This case presents sharply for decision the question whether a State or any political subdivision thereof can, consistently with the provisions of the Fourteenth Amendment, tax to a resident beneficiary for life, the *corpus* of a trust estate created by a non-resi-

dent in favor of a non-resident trustee, the subject matter of the trust being held by the non-resident trustee outside of the State free from control of the resident beneficiary, and without accountability to the resident beneficiary in any of the courts of the State, the subject matter of the trust thus receiving no protection from the State, or any political subdivision thereof, or by reason of its laws.

The Facts.

The facts are set forth in the petition for certiorari and may be briefly summarized as follows:

The testator of the petitioner, a citizen and resident of Baltimore, created by will a trust fund with a Baltimore trust company as trustee, the income of which fund was to be paid to the petitioner for life and after her death to her daughters for their life, and upon the death of the last survivor of the daughters, the principal of the fund was to be divided between their descendants. The petitioner was at the time the trust was created, and has been ever since, a resident of Norfolk, Virginia. The terms of the will were complied with by the delivery of the trust fund to the trust company, and the fund has ever since remained in the custody of that company in Baltimore, where it is taxed by both the city of Baltimore and the State of Maryland. The petitioner is not advised as to the nature of the trust investment, and neither can exercise nor has exercised any control over it. The State of Virginia and the city of Norfolk have undertaken

to tax the corpus of the estate against the petitioner as life tenant. The petitioner has regularly returned the income in Virginia for taxation, but is in these proceedings resisting the tax upon the corpus upon the ground that its imposition constitutes a taking of property without due process of law and a denial of the equal protection of the laws in contravention of the Fourteenth Amendment. The trustee refuses to recognize any tax levied on the property by the State of Virginia or the city of Norfolk, and has refused to join in these proceedings. The facts are undisputed, the tax authorities who made the assessments having expressly testified that the facts stated in petitioner's applications for relief are true. It is stipulated in the record that if the tax is invalid under the Fourteenth Amendment, the relief prayed by petitioner should be granted. The decision of the Corporation Court of Norfolk expressly overruled petitioner's contention under the Constitution, and its decision was affirmed by the Supreme Court of Appeals of Virginia, to which court this writ of certiorari is sought.

ARGUMENT.

Your petitioner's argument may be outlined as follows:

That a State can tax only that property of which it has jurisdiction; that it has jurisdiction only of such property as is within the State; that the only theory upon which intangible personal property physically located outside of the State can be held to be within

its jurisdiction is that the situs of that property is the domicile of the owner, in accordance with the rule *mobilia sequuntur personam;* that this rule is but a rule of convenience, based upon the owner's presumed dominion over the property, and embodies a legal fiction which yields to the fact in any case where the fact can be made indubitably to appear; that the fiction has so yielded to fact in the matter of tangible personal property; and that it must likewise yield to fact in the case of intangible personal property where the manner in which that property is held is such as to exclude the possibility of the dominion over it of the person beneficially interested, and consequently to exclude the hypothesis that its situs is or can be at that person's domicile; and that if, as this Court has held, tangible personal property habitually kept by the owner outside of the State of his domicile is not subject to taxation in that State, although it would be at any time within the power of the owner to bring that property into the jurisdiction of the State, there is far more reason for holding that intangible personal property which is located without the State and *which the person beneficially interested could not, even if he wanted to, possibly bring within the State,* is not subject to taxation by the State of that person's domicile.

It is a rather singular fact that the precise situation here presented has never come before this Court, the more so as it is one of frequent occurrence. Many similar, though not identical, questions have, however, been dealt with, and it is believed that both the principles decided and the language employed in deciding

them point to a solution of the problem before the court. We shall, therefore, in as brief compass as possible review some of the principal cases; and for the sake of orderly arrangement will deal first with cases involving intangible personal property, and subsequently with cases involving tangible personalty.

(1) Cases Involving the Situs for Taxation of Intangible Personal Property.

In *State Tax on Foreign Held Bonds*, 15 Wall., 300; 21 L. Ed., 179, it was held that a State could not tax bonds of a resident corporation held by non-residents, the court saying:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

In *Kirtland v. Hotchkiss*, 100 U. S., 491; 25 L. Ed., 558, it was held that the State of the owner's residence could tax bonds held by him in a foreign State in which the owner voluntarily kept the bonds.

This rule, however, does not militate against the taxability of such securities in the State in which they physically abide; for in *New Orleans v. Stempel*, 125 U. S., 309; 44 L. Ed., 174, it was held that loans and credits in Louisiana might be taxed in that State, although the owner was domiciled in New York. The maxim *mobilia sequuntur personam* was invoked to show that the situs of the property in question was at the domicil of the owner, and it was contended that

State Tax on Foreign Held Bonds, supra, had treated this rule as an unvarying one. But the court cited many cases to sustain the point that the rule was but a fiction of convenience; and speaking of *State Tax on Foreign Held Bonds,* said that the language of that decision which was relied upon

> "* * * properly construed, is not to be taken as a denial of the power of the legislature to establish an independent situs for bonds and mortgages when those properties are not in possession of the owner, but simply that the fiction of law, so often referred to, declares their situs to be that of the domicile of the owner, a declaration which the legislature has no power to disturb when in fact they are in his possession."

And the court concluded its opinion with the following observation:

> "It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; are subject to levy and sale on execution, and to seizure and delivery under replevin; and yet they are but promises to pay—evidences of existing indebtedness. Notes and mortgages are of the same nature; and while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a State may not declare that if found within its limits they shall be subject to taxation."

The doctrine of *New Orleans v. Stempel, supra,* was advanced a step further in *Bristol v. Washington*

County, 177 U. S., 133; 44 L. Ed., 701, where investments, in the form of notes for moneys lent, of a non-resident were held taxable by the State in which the investments were made by a resident agent who had the power to invest and reinvest moneys, at whose office the loans were made payable, who retained the mortgages securing them, and to whom the notes taken for the loans were returned from time to time for purposes of renewal, collection, or foreclosure, notwithstanding the fact (not existing in the *Stempel* case) that the notes were sent out of the State to the owner and retained by her except when necessarily forwarded to the agent. That this latter circumstance was immaterial was laid down by this Court in the following language:

> "In *New Orleans v. Stempel*, 175 U. S. 309, *ante*, 174, 20 Sup. Ct. Rep. 110, certain taxes were levied on money on deposit, and also on money loaned on interest, credits, and bills receivable, and it was held by this court that the statutes of Louisiana, as interpreted by the Courts of that State, in authorizing such assessment, did not violate the Constitution of the United States. There the money, notes, and evidences of credit were in fact in Louisiana, though their owners resided elsewhere. Still, under the circumstances of the case before us, we think, as we have said, that the mere sending of the notes to New York and the revocation of the power of attorney did not take these investments out of the rule."

There was no showing in this case that the State of the taxpayer's domicil had attempted to tax the prop-

erty; but such a situation was presented in *Blackstone v. Miller,* 188 U. S., 189; 47 L. Ed., 439. There the question was as to the power of the State of New York to impose a tax upon the transfer after death of a deposit in a New York Trust Company of funds belonging to a resident of Illinois, by which State the funds had previously been taxed. The court sustained the power of New York to tax the property, basing the decision on the broad ground stated in the following expression:

> "If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax."

In *State Board of Assessors v. Comptoir Nationale d'Escompte,* 191 U. S., 388; 48 L. Ed., the question was as to the taxability in Louisiana of certain credits represented by checks drawn by the borrower, secured by collateral deposited in Louisiana, the checks being ultimately sent to the home office of the lender (the Comptoir) in Paris, to which the money lent, when repaid, was remitted unless again lent by the local agent of the lender. It was held, following *New Orleans v. Stempel, supra,* that the taxation of its credits in Louisiana did not violate the Fourteenth Amendment, the credits having a local situs in Louisiana. As to the maxim *mobilia sequunter personam* the court said:

> "The maxim, *Mobilia sequuntur personam*, which was applied in the court below as forbidding taxation of the checks in the hands of the agent in New Orleans, has been frequently held to be but a fiction of law, having its origin in considerations of general convenience and public policy, and not to be applied to limit and control the right of the state to tax property within the jurisdiction, it being intended to permit the owner to deal with his personalty according to the law of his domicil, and to make testamentary disposition of it according to the law where he is rather than that of the situs of the property. It was intended for convenience, and not to be controlling where justice does not demand it."

Metropolitan, etc., Ins. Co. v. New Orleans, 205 U. S., 395; 51 L. Ed., 853, involved the same Louisiana statute as that dealt with in the *Comptoir National* case, *supra*. The subject of taxation to which the case related was credits arising out of loans made by an insurance company in Louisiana, it appearing that the notes evidencing the loans were habitually kept at the company's home office in New York. Following the case of *Bristol v. Washington County, supra*, this Court held immaterial the fact of the usual actual location of the evidences of debt, treating as the "controlling consideration" the "presence in the State of the capital employed in the business of lending money." The court said:

> "Moreover, neither the fiction that personal property follows the domicil of its owner, nor

the doctrine that credits evidenced by bonds and notes may have the situs of the latter, can be allowed to obscure the truth."

Citing *Blackstone v. Miller, supra.*

Buck v. Beach, 206 U. S., 392; 51 L. Ed., 1106, particularly in the light of its consideration in *Wheeler v. Sohmer,* 233 U. S., 434; 58 L. Ed., 1030, is not altogether easy of analysis. There it appears that one Nash, a resident of New York, invested largely in notes and mortgages in the States of Ohio and Indiana, in each of which States he had an agent. Notes made in Ohio, together with the mortgages on Ohio property securing them, were sent from Ohio to the Indiana agent, who kept them in a safe, sending them back to Ohio, however, in order to have interest payments credited on them, or to be surrendered when paid, and also sending them to Ohio a few days prior to the day fixed by Indiana for assessing such property, a few days subsequent to which time they were returned to Indiana. The question involved in the case was the taxability in Indiana of these Ohio notes.

A majority of the court, speaking through Mr. Justice Peckham, after observing that the notes were sent to Indiana for the purpose of evading taxation in Ohio, held that they were not taxable in Indiana. It was pointed out that the sole ground upon which the tax could be sustained was the presence of the notes in Indiana, and that no case had been before the court in which neither the person assessed nor the debtor was a resident of or present in the State where the tax was

imposed, and where no business was done therein by the owner of the notes or his agent relating in any way to the capital evidenced by the notes assessed for taxation. The prior cases were reviewed, and the court's conclusion stated as follows:

> "Our decision in this case has no tendency to aid the owner of taxable property in any effort to avoid or evade proper and legitimate taxation. The presence of the notes in Indiana formed no bar to the right, if it otherwise existed, of taxing the debts evidenced by the notes in Ohio. It does, however, tend to prevent the taxation in one State of property in the shape of debts not existing there, and which, if so taxed, would make double taxation almost sure, which is certainly not to be desired, and ought, wherever possible, to be prevented.
>
> "For the reason that, as the assessment in this case was made upon property which was never within the jurisdiction of the State of Indiana, the State had no power to tax it, and the enforcement of such a tax would be the taking of property without due process of law."

A vigorous dissenting opinion was filed by Mr. Justice Day (Mr. Justice Brewer concurring therein), upon the ground that while the precise question decided had not been before the court, its previous decisions clearly indicated that notes, bonds, and mortgages might acquire a situs, separate from the domicile of the owner, at the place where they were held. Practically all the cases hitherto reviewed in this brief were cited, special emphasis being laid upon

the following declaration in *New Orleans v. Stempel, supra,* which the dissenting opinion italicized:

> *"Notes and mortgages are of the same nature; and, while they may not have become so generally recognized as tangible personal property, yet they have such a concrete form that we see no reason why a state may not declare that, if found within its limits, they shall be subject to taxation."*

Buck v. Beach was very fully reviewed in *Wheeler v. Sohmer,* 233 U. S., 434; 58 L. Ed. 1030, where the question was as to the validity of a tax upon transfer after death imposed by the State of New York upon notes belonging to a non-resident and kept by him in a safe-deposit box in New York City. It was contended that *Buck v. Beach* decided the question adversely to the tax.

Four justices (Holmes, Day, Lurton, and Hughes, JJ.), held that the tax was valid—in support of which conclusion the *Stempel, Bristol, Comptoir National,* and *Metropolitan* cases, all *supra,* were cited—and that *Buck v. Beach* was probably distinguishable upon the grounds (*a*) that the Ohio notes there involved were moved back and forth between Ohio and Indiana with intent to avoid taxation in either State, and that their absence from Ohio was unjustified, and was thus "regarded as a temporary absence from home," (*b*) that the decision was carefully limited to the circumstances of the particular case, and (*c*) that a distinction had been taken between the "presence of the property" required for the property tax there in-

volved, and that sufficient to sustain a succession tax. But these judges, speaking through Mr. Justice Holmes, added:

> "If Buck *v.* Beach is not to be distinguished on one of the foregoing grounds, as some of us think that it can be, we are of opinion that it must yield to the current of authorities to which we have referred."

Two judges (McKenna and Pitney, JJ., speaking through the former), concurring in the result, held, reviewing the cases leading up to *Buck v. Beach*, that in all of them, whatever the expressions used in the opinions, the real basis of the decision was the *situs of the debt*, and not the physical presence of the notes; that it was not necessary "to overrule *Buck v. Beach*, nor make it yield in any particular to sustain the tax in the case at bar" because the *Buck* case had "in effect, reserved from its principal inheritance or succession taxing acts by rejecting as not in point cases which involved them"; and that the case at bar came within the reservation so made.

Three judges (White, C. J., and Van Devanter and Lamar, JJ., speaking through the latter) concurred in Mr. Justice McKenna's analysis of the *ratio decidendi* of *Buck v. Beach*, but held that the principle there decided—that it was the situs of the debt rather than the physical presence of its evidences—applied to inheritance and transfer taxes as well as to direct taxes, and that the tax in the case at bar should therefore be held invalid.

It may be noted in this connection that the property, in respect of which the tax was sustained by six of the nine judges, consisted of notes made by a citizen of Illinois, secured by a mortgage on land in that State, and notes made by a Virginia corporation; so that in no sense could the situs of the debt be said to be in New York. And the plurality opinion quoted with approval the following language from the *Stempel* case:

> "It is well settled that bank bills and municipal bonds are in such a concrete, tangible form that they are subject to taxation where found, irrespective of the domicil of the owner; * * * Notes and mortgages are of the same nature * * * we see no reason why a state may not delare that, if found within its limits, they shall be subject to taxation."

It may be added that except for a marginal citation (on the general principle that a State cannot extend its authority beyond its legitimate jurisdiction) in *New York, &c., Ins. Co. v. Head*, 234 U. S., 149, 162; 58 L. Ed. 1259, 1265, and a citation on another point in *Selliger v. Kentucky*, 213 U. S., 200; 53 L. Ed., 761, *Buck v. Beach*, does not appear, upon an examination extending through 271 U. S., ever to have been since cited by this Court.

White perhaps differing somewhat in principle from the current of cases being examined here, it may not be inappropriate to notice at this point, where chronologically it belongs, the case of *Bullen v. Wisconsin*, 240 U. S., 625; 60 L. Ed. 831, especially because it carries, in our judgment, an important suggestion as

to the case at bar. In that case it appeared that one Bullen, a resident of Wisconsin, had created a trust in favor of a Chicago trust company with directions after his death to pay over one-third of the income (subject to certain small gifts) to his widow for her life, and the rest of the income and ultimately the principal to his four sons. But he reserved the entire capital of the trust during his life, including the right to revoke it, and in fact he received the entire income during his life. The case involved not the taxability of the fund during Bullen's life, but the liability of the fund to inheritance taxation by Wisconsin. It was held that it was so liable. Apart from such differences of principle as might have been considered to exist between inheritance tax cases and direct tax cases, hereinbefore adverted to, the noteworthy circumstance is that the whole stress of the court's opinion was laid upon the revocable character of the trust, which resulted, as the court said, in the Wisconsin court's being "fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute." This emphasis, we suggest, points by contrast to the different rule to be applied in the case at bar.

Fidelity, etc., Co. v. Louisville, 245 U. S., 54; 62 L. Ed. 154, involved the validity of a tax by the City of Louisville upon a resident in respect of deposits in St. Louis of a business there carried on by the Kentucky resident. It was held that the tax might lawfully be imposed. For the sake of argument, it was conceded that the deposits might also have been taxed

in Missouri; but the court held it proper to presume that the Kentucky tax was imposed "for the general advantages of living within the jurisdiction," and that those advantages might "be measured more or less by reference to the riches of the person taxed." *Kirtland v. Hotchkiss, supra,* was relied upon; and of *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S., 184; 50 L. Ed. 150 (to be noticed later), it was pointed out that it related to chattel property; and the court said that it had not attempted to press so far as was contended for the principle that the power of taxation ought to be denied as to debts depending for their validity and enforcement upon a jurisdiction other than that levying the tax.

It is important to notice, though perhaps superfluous to point out, that in this case the keeping of the deposit in Missouri was a purely voluntary act on the part of the taxpayer.

In *De Ganay v. Lederer,* 250 U. S., 376; 63 L. Ed. 1042, the question was as to the taxability under the Federal Revenue Act of 1913 of the income from stock and bonds owned by a non-resident alien, but kept in Pennsylvania by an annuity and life insurance company acting as agent for the owners. This question was treated by the court as involving the simple inquiry: "Is the income from the stock, bonds, and mortgages, held by the Pennsylvania Company, derived from property owned in the United States?"

The court answered the question affirmatively, citing a number of the cases heretofore reviewed, and saying:

> "We have no doubt that the securities herein involved are property. Are they property within the United States? It is insisted that the maxim, '*Mobilia sequunter personam*,' applies in this instance, and that the *situs* of the property was at the domicil of the owner in France. But this Court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds, and mortgages may acquire a *situs* at a place other than the domicil of the owner, and be there reached by the taxing authority."

Finally, in *Maguire v. Trefry*, 253 U. S., 12; 64 L. Ed. 739, a case was presented of the taxation of the income of a fund held by a non-resident trustee for a resident beneficiary. Had the case involved taxation of the corpus it would have been substantially identical with that at bar. Citing *Fidelity, etc., Co. v. Louisville, supra,* and *Kirtland v. Hotchkiss, supra,* the court held the income to be taxable. It may not be inappropriate here to say that in the case at bar the record shows that the petitioner does not question and has paid the tax similarly imposed by the State of Virginia upon the income received by her.

But the important point to observe in connection with this decision is that the court stated that in considering the constitutional questions involved, it would accept the views taken by the Massachusetts Court of its statute, which is quoted from the decision below as follows:

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. *It is founded upon the protection afforded to the recipient of the income by the Government of the commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession.* That Government provides for him all the advantages of living in safety and in freedom, and of being protected by law. It gives security to life, liberty, and the other privileges of dwelling in a civilized community. *It exacts in return a contribution to the support of that government, measured by and based upon the income, in the fruition of which it defends him from unjust interference.* It is true of the present tax, as was said by Chief Justice Shaw in Bates *v.* Boston, 5 Cush. 93, at page 99: 'The assessment does not touch the fund, or control it, nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee' to the beneficiary." (Italics ours.)

We pause merely to point out that the italicized language, however undeniably accurate in connection with the case before the court—that of an income tax—in connection with which it was used, is wholly inappropriate so far as relates to the *corpus* of a fund in respect of which the taxing State grants and can grant neither enjoyment, security, nor protection.

With this we conclude our examination of cases involving the taxation of intangible property and income Briefly synthesizing the results, the following propositions appear to be established:

(1) A State may not tax property outside of its jurisdiction (*State Tax on Foreign Held Bonds* and authorities *passim*).

(2) A State may apply the rule *mobilia sequuntur personam*, and tax intangibles voluntarily kept or placed by one of its citizens without the State (*Kirtland v. Hotchkiss; Fidelity, etc., Co. v. Louisville*); and the foregoing rule holds good when he has established a trust revocable at his instance (*Bullen v. Wisconsin*).

(3) A State may tax the income of a citizen derived from property without the State, even though that property be held in trust (*Maguire v. Trefry*), and may tax the income of non-residents from property within the taxing jurisdiction (*De Ganay v. Lederer*).

(4) Intangible property consisting of notes, bonds, and stocks may acquire a situs for purposes of taxation separate and apart from the domicile of the owner (*New Orleans v. Stempel; Blackstone v. Miller; State Board of Assessors v. Comptoir National; Wheeler v. Sohmer*); and this is true even though such intangibles are frequently sent to the owner and remain in his possession (*Bristol v. Washington County; Metropolitan, etc., Ins. Co. v. New Orleans*).

(5) The rule *mobilia sequuntur personam* is a fiction of convenience, which always yields to the fact when required by positive law or considerations of justice (*New Orleans v. Stempel; State Board of Assessors v. Comptoir National; Metropolitan, etc., Insurance Co. v. New Orleans;* and many others).

(6) This Court has never dealt with the case of the *corpus* of a trust estate held outside the taxing State by virtue of the terms of the trust instrument, the trustor being a non-resident and the beneficiary being without control of or power over the trust subject. This is the case presented here.

(2) Cases Involving the Situs for Taxation of Tangible Personal Property.

In undertaking a separate examination of cases within this category we would not be understood as considering that the constitutional questions arising as to the situs of tangible and intangible property respectively call fundamentally for differing methods of approach. This is not our view. In every case the question presented is whether the subject of taxation is within the jurisdiction of the State. The distinction sometimes taken, and usually correctly taken, between the two classes of property in this connection may be regarded, speaking broadly, as a matter of evidence; not, indeed, evidence in its technical legal sense of the body of law relating to the production of testimony, but as evidence in a wide sense, growing out of the nature of the

property, on the question of situs. From this standpoint we have held it well to treat separately the two classes of property, the more so since in our opinion that method of treatment is peculiarly appropriate in the present case. We shall not attempt exhaustiveness, but shall present the cases in sufficient detail to note the trend of decision. Furthermore, since no question of interstate commerce is here involved, we shall lay on one side cases in which that matter was treated as a determinative element.

Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18; 35 L. Ed., 613, did not directly involve a tax upon the property of the company, but a tax upon its capital stock which the court treated as being "in substance and effect, a tax upon that property." The tax was levied by Pennsylvania upon such a proportion of the capital stock as the miles run by the company's cars in Pennsylvania bore to the total number of miles run. The company was a corporation of Illinois. The tax was sustained. In the course of Mr. Justice Gray's opinion he said:

> "No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold

> and jewels, which could be easily carried by the owner from place to place, or secreted in spots, known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used."

Giving effect to these principles, the learned justice held that the State had the right to "tax the specific cars which at a given moment were within its borders"; and having approved the method of assessment adopted, the sustaining of the tax ensued.

Louisville, &c., Ferry Co. v. Kentucky, 188 U. S., 385; 47 L. Ed., 513, is not a case of tangible personal property, but may conveniently be noticed under this head. It was there held that the inclusion, by Kentucky, in the valuation for tax purposes of the franchise by a Kentucky ferry corporation, of a franchise granted that corporation by Indiana for a ferry from the Indiana to the Kentucky shore, violated the Fourteenth Amendment. In reaching its conclusion the court said:

> "While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government."

Delaware, etc., R. Co. v. Pennsylvania, 198 U. S., 341; 49 L. Ed. 1077, dealt with a tax imposed by Pennsylvania upon the capital stock of corporations. Among the company's assets was a considerable quantity of coal which had been mined by the company (a Pennsylvania corporation) but shipped by it to points without the State, and which remained permanently without the State awaiting sale or other disposition. The coal so on hand at the taxing date was approximately the same as that usually kept in stock at the points of storage; and it was the company's contention that its value should be deducted from the total value of the stock in order to determine the amount constitutionally taxable in Pennsylvania. The contention was sustained. The tax upon the value of the capital stock was treated as a tax upon the property in which that capital was invested (*Pullman, etc., Co. v. Pennsylvania, supra,* and other cases), and as it was outside the jurisdiction of Pennsylvania it was held not to be taxable there. A contention "that, by reason of the transitory character of the coal, it has never, in law, lost its original domicil * * * in Pennsylvania" was rejected. The protection of the 14th Amendment was thus asserted:

> "It is plain that in the case at bar the coal had lost its situs in Pennsylvania by being transported from that state to foreign states for the purposes of sale, with no intention that it should ever return to its state of origin. It was, therefore, as much outside the jurisdiction of the state of Pennsylvania to tax it as was the Indiana franchise in the case just cited, and it has

> been taxed just as directly and specifically under the facts stated in this case as was the Indiana franchise taxed in Kentucky by the valuation of the Kentucky franchise, which value was increased by the value of the franchise created by Indiana. Taxation of the coal in this case deprived the owner of its property without due process of law, as is held in the above case, and the owner is entitled to the protection of the 14th Amendment, which prevents the taking of its property in that way."

It was in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S., 194; 50 L. Ed. 150, that this Court for the first time contrasted, at length and in detail, tangible with intangible personalty in respect of situs, and furnished the basis of the statement, prefaced to our treatment in this brief of cases involving tangible personalty, that the distinction is not fundamental but is rather a matter of the evidence concerning situs arising from the respective qualities of the two classes of property. The question was whether Kentucky could, consistently with the Fourteenth Amendment, tax refrigerator cars belonging to a Kentucky corporation, but permanently located in other States. The question was answered in the negative. So clearly did Mr. Justice Brown discuss the philosophical foundations of the power of taxation and the exercise of that power that we shall quote from the opinion at some length.

Of the basis for the exercise of the taxing power he pointed out that it was a corollary of protection afforded or benefits received. He said:

"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares,—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law."

And in discussing the subject of territorial jurisdiction he used the following language:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases

> of land, which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State; much less where such action has been defended by any court. It is said by this Court in the *State Tax on Foreign-held Bonds Case*, 15 Wall. 300-319, 21 L. Ed. 179-187, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised."

After pointing out that "the argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction," the opinion contrasts the respective situations of tangible and intangible personalty in the following terms:

> "There is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in

the case of mortgages, in the State where the property is retained. Such have been the repeated rulings of this Court."

With reference to the foregoing, we call attention the fact that *as to each of the points of contrast s indicated by the court to exist as a general rule ween tangible and intangible property, the situation he property involved in the case at bar is analogous that of tangible property, rather than intangible.* us:

. The property is not "held secretly," the fund ing been created by a will whose probate is a mat- of record.

. Its existence and ownership, for the same reason, be ascertained in the State of its actual situs; and record shows that it has been so ascertained there is taxed there.

. The owner of the legal title—*i. e.*, the trustee— be reached by process in Maryland.

he court proceeded:

"The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its situs, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed, and where it receives its entire protec-

> tion, irrespective of the domicil of the owner. We have, ourselves, held in a number of cases that such property, permanently located in a State other than that of its owner, is taxable there."

All these arguments are equally cogent in favor of taxing at its actual situs the property involved here.

Following these intimations, the court qualified its decision as follows:

> "It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same State, which are controlled by different considerations."

It seems clear that this cautionary expression should be read and interpreted in the light of what was evidently in the mind of the court—the normal case of intangibles held by a person in his own right—and should not be given application to such a case as the present.

We thus come to *Frick v. Pennsylvania*, 268 U. S., 473; 69 L. Ed., 1058, the latest and in some respects the most notable of the expressions of this Court on the situs of tangible property. In so far as it dealt with that subject, the question was as to the validity of the application of the Pennsylvania tax on the transfer of property after death to tangible personal property in other States. The tax, as so sought to be applied, was held invalid.

The court summarized the effect of previous decisions in the following passage:

> "These decisions show, first, that the exaction by a State of a tax which it is without power to impose is a taking of property without due process of law, in violation of the 14th Amendment; secondly, that while a State may so shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them any extraterritorial operation; and, thirdly, that, as respects tangible personal property having an actual situs in a particular State, the power to subject it to State taxation rests exclusively in that State, regardless of the domicil of the owner."

It further quoted extensively from *Union Refrigerator Transit Co. v. Kentucky, supra,* of which we have made such copious use above, and also quoted the matter excerpted above from *Pullman's, etc. Co. v. Pennsylvania,* stating the historical basis of the maxim *mobilia sequuntur personam,* and overruled the contention of counsel for the State that a fundamental distinction existed, as to territorial jurisdiction, between property taxation and inheritance taxation.

From this review of the cases under this head it appears that the doctrine is now fully entrenched that tangible personal property outside the State of the owner's domicile is not subject to taxation by that State, while as to intangible property in the form of securities it seems equally clear that it is taxable in the State of its actual situs and also, even when separated from the State of the owner's domicile, taxable by that

State *when voluntarily kept in the foreign State by the owner.* The contention here made is that when its situs in the foreign State is fixed by law or by the terms of the instrument under which it is held, there is far more reason for applying the rule, now thoroughly settled, which governs tangible property, than there is in the case of tangible property itself, which only the owner's will, rather than legal compulsion, maintains in the foreign jurisdiction.

Viewing the question from the point of view of the various reasons usually relied upon by this Court to sustain taxation, as laid down in the decisions, we would inquire whether any of those reasons is operative here. Not surely that of the protection of the tax subject, for the trust estate receives no protection from Virginia. Not that of preventing the escape of property from taxation, for it stands admitted that the property is both taxable and taxed in Maryland. Not the reason of convenience upon which the maxim *mobilia sequuntur personam* is based—the difficulty of discovering, localizing, and exacting a contribution from intangible personalty—for the existence, the location, and the liability of this fund are all determined by law and proclaimed by public record with far more of certainty, fixity, and permanence than in the case of tangible personalty. Not the conception of a proportionate contribution in return for the benefit of living in the State, for that contribution is made through the income tax; and if the suggestion were that this contribution should be measured by apparent wealth there would be just as much reason for including real

estate outside of Virginia. No reason remains except the naked application of the maxim *mobilia sequuntur personam;* but of this we may say in the language of *Union Refrigerator Transit Co. v. Kentucky, supra,* already so heavily drawn upon:

> "* * * the maxim *mobilia sequuntur personam* may only be resorted to when convenience and justice so require. The proper use of legal fiction is to prevent injustice, according to the maxim *In fictione juris semper aequitas existit.* See *Eidman v. Martinez,* 184 U. S. 581, 46 L. Ed. 700, 22 Sup. Ct. Rep. 515; *Blackstone v. Miller,* 188 U. S. 189, 206, 47 L. Ed. 439, 445, 23 Sup. Ct. Rep. 277. 'No fiction,' says Blackstone, 'shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, that might result from the general rule of law.' (3 Bl. Com. 43.) The opinion argues with great force against the injustice of taxing extraterritorial property when it is also taxable in the State where it is located."

Cases in Other Courts.

In our view, the conclusion which we have sought to establish results with such controlling persuasiveness from the decisions of this Court that the citation of other authorities is unnecessary. A number of cases will be found collected in the note to *Commonwealth v. West India Oil Refining Co.,* 138 Ky., 828; 129 S. W., 301; 36 L. R. A., N. S., 295, at the reference last given. It may be remarked that while the case last cited is an exception, cases in the State courts frequently are de-

cided on questions of statutory construction rather than on constitutional principles.

This has measurably been the case in Virginia, the prior cases in that State but faintly suggesting a serious presentation of the constitutional question which we have urged. A rapid review will show the growth of the doctrine that led to the summary disposition of the case at bar.

In *Selden v. Brooke* (1906), 104 Va., 832, the question was as to the validity of taxes assessed by the city of Norfolk upon a trust fund consisting of intangible property in the hands of a non-resident trustee, in the income from which a resident beneficiary had a life estate. The trustee was there appointed by decree of the Corporation Court of the City of Norfolk, which had jurisdiction over the fund. It was held that the fund was taxable in Virginia. It is quite apparent that the fact that the fund was created in Virginia was not without its effect on the minds of the court, for in deciding the case the court pointed out that if the domicile of a non-resident trustee were to fix the situs of intangible property for taxation, there would be afforded a "ready means of escape from taxation." A quite different situation exists in the present case, where the fund prior to the creation of the trust was never in Virginia, where there is no control of it by any court in Virginia, and where consequently no question of "escaping" from taxation arises, but the question is whether the existence of a Virginia beneficiary is to have the effect of making that taxable by the State, which was not taxable before.

The point under the Federal Constitution, which we urge here, does not seem to have been presented in the case under consideration. The court said:

> "The contention that the construction indicated would render the statute unconstitutional, proceeds upon the hypothesis that the tax is against the non-resident trustee, whereas he is personally unaffected by the imposition, and is but the conduit through the medium of which the tax upon the property of a citizen passes into the State treasury."

We are not proceeding here on the hypothesis that the tax is unconstitutional because it is against a non-resident trustee, but, as has been fully shown, upon the hypothesis that it is unconstitutional *because the thing taxed is not within the jurisdiction of the State.*

So, also, in *Wise v. Commonwealth* (1918), 122 Va., 693, the fund from which the trust was created originated in Virginia and was made the subject of a trust in favor of a non-resident trustee, but having some Virginia beneficiaries. This circumstance, again, seems to have affected the court in holding the trust fund subject to taxation in Virginia. The court said:

> "If it were otherwise, citizens of this State could, by creating foreign trusts, deprive the State of a very large part of its revenue."

In *Franklin Trust Co. v. Booker* (1918), 122 Va., 680, however, a case was presented where the fund itself had never been within the State. The constitutional point upon which we rely does not, from the report of the case, appear to have been distinctly presented; and

the court held the fund taxable upon the authority of a simple reference to the *Wise* case just discussed.

Likewise, in *Ellett v. Commonwealth* (1922), 132 Va., 136, on a state of facts apparently identical with that in the *Booker* case, this Court in a *per curiam* opinion held the fund taxable, contenting itself with a mere citation of the cases discussed above.

As intimated at the outset of this discussion, the present case exhibits certain characteristics of fact which do not appear to have existed in the cases reviewed. For example, it does not appear from them that the trust had been subjected to taxation by the State in which it was held. In some of the cases the fund originated in Virginia. In none of them does the constitutional point appear to have been made which we presented to the court, and the situation appears to be that the court passed into its present course of decision without a realization of the far-reaching contrast of fact between the earlier decisions and the later

Conclusion.

The tax complained of represents a manifest effort by the State to reach a tax subject beyond its jurisdiction, in contravention of the Fourteenth Amendment, and the decision of the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

NATHL. T. GREEN,
ROBT. B. TUNSTALL,
Counsel for Petitioner.

(5577)

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(5577)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 1079

LUCY B. BROOKE,
Petitioner

v.

CITY OF NORFOLK, ET ALS.,
Respondents

UPON CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

REPLY BRIEF ON BEHALF OF THE PETITIONER

NATHANIEL T. GREEN,
ROBT. B. TUNSTALL,
Counsel for Petitioner.

Richmond, Virginia,
January 17, 1928.

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REPLY BRIEF ON BEHALF OF THE PETITIONER

A few of the statements made in the brief for the Commonwealth, just filed herein, seem to require reply.

(1) At pages 2 and 3 of the brief it is said that while it appears that the application made herein to the Corporation Court for the city of Norfolk for relief against erroneous assessments for the year 1923 appears to have been filed within two years from the first day of Sep-

tember in the year in which the assessments were made, as required by Code of Virginia, secs. 2385 and 2389, the contrary appears as to the application in respect of the assessments for 1924. Even if this court were disposed to entertain a question never before raised in the case, it is sufficient to say that the statement is palpably incorrect. Counsel for the Commonwealth refer to page 20 of the record as sustaining their point. What is found there is the *order* on the application. At page 15 it distinctly appears that the application was filed on August 2, 1926, well within the two-year period from September 1, 1924.

(2) At page 4 of the brief, a number of cases are cited to the proposition that a general gift of the income of a fund is equivalent to a gift of the property itself. We do not know the purpose of the citations. If it be intended to say—and this is what the cited cases hold—that an *unlimited* gift of income passes the principal, the statement, while correct, is academic, as no such case is presented here. If it be intended to say that on a gift of the income as a life estate, with a gift over of the principal, the holder of the life estate is taxable, in respect of the principal, we would say that this is without doubt the law of Virginia, and, as attempted to be applied in this case, explains our presence in this court. But the authorities cited on this point are without bearing on the question whether this law of Virginia, so attempted to be applied in respect of securities held by law without the State, is valid; and this is the sole question here. Nor is the "policy" of Virginia, alluded to on page 6 of the brief, nor its doctrine, as expounded in pages 6 to 12, of

importance when in contravention of the Constitution of the United States.

(3) The brief cites no other cases not cited in our opening brief, except *Hunt* v. *Perry*, 165 Mass. 287, and *Lewis* v. *County of Chester*, 60 Pa. St. 325. Of these, the first is in point and supports the position of the Commonwealth, but it is worth while to observe that the Massachusetts court in *Maguire* v. *Trefry*, 230 Mass. 503, recognized that some of the expressions used in it "cannot stand in the light of decisions of the United States Supreme Court in *Union Refrigerator Co.* v. *Kentucky*, 199 U. S. 194; *Delaware, etc., R. Co.* v. *Pennsylvania*, 198 U. S. 341, and *Louisville and Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385." It is true, however, that the Massachusetts court held, and was sustained by this court in holding, that the *income* tax there in question was valid. The question decided in *Hunt* v. *Perry*, however, has not been decided in this court, and is before it in this case.

On the other hand, *Lewis* v. *County of Chester, supra*, does not decide that question at all. All it holds is that a New York trustee, removing to Pennsylvania and there investing a part of the trust estate in Pennsylvania mortgages, is liable to Pennsylvania taxes *on the Pennsylvania mortgages*, but not on the rest of the trust estate. The case expressly leaves undecided the question as to the taxability in Pennsylvania of the beneficiary.

(4) All the Virginia cases cited by counsel were referred to by us in our brief; and we did not leave to "inference" our conviction that such of them as present the question here involved were wrongly decided. We

undertook to point out how the court fell into error; we left no doubt as to our conviction that it did so.

(5) The statement at page 13 of the brief that the question for consideration here "narrows itself down to the proposition: 'Does the fourteenth amendment to the Federal Constitution compel the several States to adopt retrospective forms of taxation,'" is, frankly, beyond our comprehension. We have never before heard it suggested that the fourteenth amendment compels any State to adopt any form of taxation, or, for that matter, to levy taxes at all. It is surely unnecessary to say to this court that our reliance upon the amendment is as invalidating the tax complained of here, not as "compelling" some other tax not levied and not complained of.

(6) The brief discusses no case from this court except *Fidelity, etc., Co.* v. *Louisville*, 245 U. S. 54, from which a long quotation is made. That was a case where a taxpayer voluntarily kept intangibles in a State other than that of his residence, as pointed out at pp. 15 and 16 of our opening brief; and is, consequently, not in point here.

It is respectfully urged that the brief fails to meet the argument which we have presented.

Respectfully submitted,

NATHANIEL T. GREEN,
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Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 229

LUCY B. BROOKE,
PETITIONER,

v.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, HARRY E. McCOY, W. I. GILKESON, AND THE COMMONWEALTH OF VIRGINIA,
RESPONDENTS

UPON CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

COMMONWEALTH OF VIRGINIA,

By E. WARREN WALL,
Counsel Department of Taxation, of Counsel.

Richmond, Virginia,
January 18, 1928.

LEWIS PRINTING CO., RICHMOND, VA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 1079

LUCY B. BROOKE,
PETITIONER,

v.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, HARRY E. McCOY, W. I. GILKESON, AND THE COMMONWEALTH OF VIRGINIA,
RESPONDENTS

UPON CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

THE FACTS

Lucy B. Brooke, a citizen and resident of the city of Norfolk in the State of Virginia, is the beneficiary of a trust fund amounting to $80,000, invested in intangible personal property, which property is held for her exclusive benefit by the Safe Deposit and Trust Company of

Baltimore, trustee, the entire net income being paid to her each year. This trustee is a corporation of the State of Maryland, with its principal office in the city of Baltimore of that State.

The Commonwealth of Virginia, in order to raise revenue for the support of its government, imposes a classified property tax upon all intangible property the beneficial interest of which is owned by its residents. The city of Norfolk also, during the years in question, imposed a property tax on intangible personal property owned by residents of that city. The Commonwealth of Virginia, in addition, imposes a general income tax upon all income received by its citizens.

During the years 1923 and 1924, the Commonwealth of Virginia, in computing the income taxes due by the said Lucy B. Brooke, included in the assessment the income derived by her from the trust fund aforesaid, and also included $65,920 as the value of the corpus of the said trust fund in computing her personal property taxes. Within the time required by law, the said Lucy B. Brooke applied to the corporation court of the city of Norfolk for exoneration from the assessment made against her for the year 1923 (Record, page 14). Said application, however, was not made within the time required by law with respect to the taxes assessed for the year 1924. No complaint was made touching the authority of the Commonwealth to impose taxes upon the income received by the petitioner from the trust fund in question. It is, in fact, admitted by counsel for the petitioner (Brief, page 17) that, under the authority of *Maguire* v. *Trefry*, 253

U. S. 12, 64 L. Ed. 739, 40 Sup. C. 417, the Commonwealth of Virginia has plenary power to tax the income derived from this fund. The contention is simply that, in measuring the personal charge, which is imposed by law in the nature of a property tax assessable against the petitioner, the Commonwealth is forbidden to consider the value of her interest in that portion of her intangible property which is held in trust for her in Baltimore.

ARGUMENT

Certiorari Should be Dismissed With Respect to the Assessment For 1924

It plainly appears from the record, page 20, that prior to November 20, 1926, no application was made to the Corporation Court of the city of Norfolk for exoneration from the assessment of taxes made in and for the year 1924. It does not appear from the record that any petition for correction was previously filed in the clerk's office. The Virginia statute providing for exoneration from alleged erroneous assessment, Code section 2385, provides that any person assessed with taxes on property, aggrieved by such assemment, may, within two years from the first day of September of the year in which such assessment is made, apply for relief to the court in which the officer who made the assessment gave bond and qualified. This statute was construed by the Supreme Court of Appeals of Virginia in *Leesburg* v. *Loudoun National Bank*, 141 Va. 244, in which the court held that it was not sufficient that notice of the purpose

to apply for such correction was given within the two years. The court says in this case:

> "We think the language of the statute is conclusive on this point, and that the application must be actually made, and made direct to the court, within two years from September 1st of the year in which the assessment was made."

TAX CLEARLY RIGHT

It is difficult to perceive upon what ground the authority of the Commonwealth of Virginia to include the value of the funds held in trust for the petitioner along with the value of her other property can be drawn in question. It is true that the precise point does not seem to have been passed upon by this honorable court except by inference. However, this right has been firmly established by a long line of decisions by the courts of last resort of the several States.

In the case of personal property, it has been repeatedly held that a general gift or bequest of the income is in contemplation of law equivalent to a gift of the property itself, that the principal of the fund passes by a gift of the income therefrom.

Elton v. *Sheppard*, 1 Bro. Ch. (Perkins' Ed.) 463; *Adamson* v. *Armitage*, 19 Ves. Jr. (Sumner's Ed.) 416, 418; *Stretch* v. *Watkins*, 1 Madd. 253, 258; *Clough* v. *Wynne*, 2 Madd. 188, 191; *Haig* v. *Swiney*, 1 Sim. & Stu. 487, 490; *Humphrey* v. *Humphrey*, 1 Sim. N. S.

536, 540; *Southouse* v. *Bate*, 16 Beav. 132, 133; *Peale* v. *White*, 7 La. Ann. 449-451; *Jenings* v. *Baily*, 17 Beav. 118, 120; *Collier* v. *Collier*, 3 Ohio St. 369, 374; *Stone* v. *North*, 41 Me. 265, 271; *Hatcher* v. *Bassett*, 52 N. Y. 359, 362; *Pennsylvania Co. for Ins. on Lives and Granting Annuities' App.*, 83 Pa. 312, 315; *Millard's App.*, 87 Pa. 457, 459; *Sampson* v. *Randall*, 72 Me. 109, 112; *Sproul's App.*, 105 Pa. 438, 441; *Post* v. *Rivers*, 40 N. J. Eq. 21, 22; *Dascomb* v. *Marston*, 80 Me. 223, 231; *Bishop* v. *McClelland*, 44 N. J. Eq. 450, 453; *Lippincott* v. *Pancoast*, 47 N. J. Eq. 21, 26; *Hartson* v. *Elden*, 50 N. J. Eq. 522, 524.

Hunt v. *Perry*, 165 Mass. 287, is identical with the case at bar. In that case the constitutional question was presented that the fund taxed was not within the jurisdiction of the taxing State. The facts in that case were that the testator, a resident of the State of Maine, by his will, probated in that State, bequeathed his intangible personal property to a trustee, a resident of the State of Maine, who kept the evidences of debt in the State of his residence. The beneficiaries were residents of the State of Massachusetts, and that State imposed its taxes not upon the trust fund, but upon the interests of the resident beneficiaries therein. In answering this constitutional question, the court said:

> "This argument rests on the ground that the property is situated out of the State; that the beneficial interest of a *cestui qui trust* is nowhere else made taxable; and that this statute selects for taxation a

kind of interest not otherwise taxable, and so imposes a tax which is disproportionate. This argument, however, is met by the suggestions already made, that the *cestui qui trust* is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take away the power of the legislature to subject the interest of the *cestui qui trust* to taxation here, if they live here."

To the same effect is *Lewis* v. *County of Chester*, 60 Pa. 325. By a long line of Virginia decisions, it has been held by the State court of last resort that it is the policy of this Commonwealth to tax the interest of all residents in all intangible property owned by them, regardless of the fact that the income from the property may be collected for and paid over to the owner by a trustee, and no matter whether this trustee be a resident or a nonresident of this State.

THE VIRGINIA DOCTRINE

This proposition was first presented to the Supreme Court of Appeals of the State of Virginia in *Selden* v. *Brooke*, 104 Va. 832. In that case the trustee was appointed by the Corporation Court of the city of Norfolk. The trustee was a nonresident of the State of Virginia, but under the terms of the trust he was directed to pay the income to the *cestui qui trust* during her life. The

cestui qui trust, Elizabeth T. Selden, was a citizen of Virginia, and domiciled in the city of Norfolk. The court said (pages 833-834):

> "It is the policy of this Commonwealth to impose taxes upon all intangible property of its citizens in the county or corporation of their residence, without regard to the situs of the physical symbols by which such property is evidenced. *Commonwealth* v. *Williams,* 102 Va. 778, 47 S. E. 867. But the specific enactment by authority of which these assessments were made is as follows: 'If the property is the separate property *of a person over twenty-one years of age,* or a married woman, it shall be listed and taxed to the trustee, if any they have, and if they have no trustee it shall be listed by and taxed to themselves; in either case it shall be listed and taxed in the county or corporation where they reside * * *. If the property is held for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence (except as hereinbefore provided).' Acts 1897-98, p. 519, amending section 492 of the Code of 1887.
>
> "While the statute may be unskilfully drawn, we are of opinion that by fair construction the case in judgment is obviously within its provisions. The income from the trust fund, upon which the tax is imposed, constitutes, in a certain sense, the separate property of Elizabeth T. Selden, a person over twenty-one years of age, who has a trustee, and resides in the city of Norfolk. The language, 'If

> the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county of his residence (except as hereinbefore provided)' is controlled by the antecedent provision, that whether the person whose property is amenable to tax has or has not a trustee, the property shall 'in either case be listed and taxed in the county or corporation where they reside.' Though the tax is assessed in the name of the trustee, the burden is, in reality, imposed upon the beneficial owner, a resident of the Commonwealth, who enjoys the protection of its laws along with other citizens, and ought, in fairness, to contribute her due proportion of revenue for the support of the government."

The next of these cases to which the attention of the court was directed was *Wise* v. *Commonwealth*, 122 Va. 693. In this case certain real estate in the county of James City, Virginia, had been held by E. C. Boothe, trustee, for use and benefit of Clara H. Boothe, the wife of E. G. Boothe, and their children. In 1906 the said real estate was sold. The funds so derived were turned over to Henry A. Wise, a resident of New York, and another, as trustees for the said Clara H. Boothe for life, with remainder over to the children. The court quoted with approval the case of *Selden* v. *Brooke, supra,* and added (page 698):

> "Not a word is said about the trustee being an appointee of a court of this State or his account-

ability to such court, nor is there an intimation that the result would have been different if the appointment had been by the voluntary act of the parties in or out of the State. Indeed, the last paragraph quoted above would seem to indicate that the result would have been the same if the appointment had been by such voluntary act of the parties."

The court said further (page 700):

"In 17 Ruling Case Law, 620 (citing cases from Iowa, Connecticut, Pennsylvania and other States) the law is stated thus: 'A devise or bequest of the "use and improvement" of property during the life of the devisee, or of the rents, profits and income of the property for life, is in effect a devise of the property itself for life.'

"Independent of precedent, it seems clear that a gift for life of the whole income from a fund is a gift of a life estate in the fund itself, and, for the purpose of taxation, it seems immaterial whether there is or is not interposed a trustee to collect and pay over such income.

"In the instant case, Mrs. Boothe has an estate for her life in the trust fund in controversy, and as she resides in this State her trustee is properly chargeable here with the taxes from which he seeks relief. It is the duty of the life tenant who receives the entire income to pay the taxes on the corpus.

"This is no hardship on the life tenant. She occupies the same position as any other life tenant

> in this State of intangible personal property. The property in which she has a life is taxable at the place of her residence, without regard to the situs of the physical symbols by which such property is evidenced. *Commonwealth* v. *Williams,* 102 Va. 778, 47 S. E. 867. If it were otherwise, citizens of the State could, by creating foreign trusts, deprive the State of a very large part of its revenue."

Simultaneously with the *Wise case, supra,* the Supreme Court of Appeals of the State of Virginia had presented to it the case of *Brooklyn Trust Company* v. *Booker,* 122 Va. 680. The court stated the question presented in that case to be as follows (page 680):

> "Where a citizen of this State, residing in the State, has a life estate in choses in action held in trust for him by a nonresident trustee, can this State levy a tax on such fund, when such choses are not now, and never have been, within this State, and the trustee is and always has been a nonresident of this State?"
>
> "This question is answered in the affirmative by *Wise, Trustee* v. *Commonwealth,* 122 Va. 693, this day decided, where the reasons therefor are given."

Again this question came before the Supreme Court of Appeals of the State of Virginia in *Ellett* v. *Commonwealth,* 132 Va. 136, a case in which, like the case of *Brooklyn Trust Company* v. *Booker, supra,* the fund was not and never had been within the territorial limits

of the Commonwealth of Virginia. The court said in that case (page 137):

> "It has been frequently decided that under the tax laws of this State, where a citizen of this State, resident in the State, has a life estate in choses in action held in trust for him by a nonresident trustee, such choses are taxable in this State, although they are not and never have been within this State, and the trustee is not a resident of the State. *Selden* v. *Brooke*, 104 Va. 832, 52 S. E. 632; *Wise* v. *Commonwealth*, 122 Va. 693, 95 S. E. 632; *Brooklyn Trust Co.* v. *Booker*, 122 Va. 680, 95 S. E. 664. In the instant case, the only objection made to the assessment is that, under the provisions of section 492 of the Code, as amended by Acts 1918, page 169, it should have been listed in the name of the trustee and not in that of the life tenant. The cases cited are also authority for the proposition that the tax, though assessed in the name of the trustee, is not against him but against the beneficiary, and the trustee is the mere conduit through the medium of which the tax upon the property of a citizen passes into the treasury. This is undoubtedly so where, as here, the income of the life tenant from the fund is in excess of the tax imposed."

It is thus made clearly to appear that the State of Virginia does not impose any tax upon the *foreign trustee* or the *funds in his hands as such*, and that the tax assessed is simply a personal charge against a resident of the

State, the basis for this charge being the interest of that resident in the intangible personalty held in trust for him. It is pertinent here to inquire, if the Commonwealth of Virginia is forbidden by the Federal Constitution to tax its own citizens and residents on account of their interest in intangible personal property, then upon whom may it impose taxes on account of such ownership?

It appears that the petitioner has no fault to find with the above mentioned line of Virginia cases (record, page 5, brief, pages 33 and 34). On the other hand, the petitioner seeks to distinguish the case at bar from these cases by taking a position that in *Selden* v. *Brooke* and *Wise* v. *Commonwealth, supra*, the fund from which the trust was created originated in Virginia. No attempt is made by the petitioner to distinguish the cases of *Brooklyn Trust Company* v. *Booker* and *Ellett* v. *Commonwealth, supra*, in each of which cases it appears from the opinion of the court that the fund originated outside of Virginia and was held outside the State by a non-resident trustee. In referring to these cases, counsel for the petitioner content themselves with the bald statement that the court seems to have given them little consideration, the inference being that the court was perhaps ill advised in its judgment.

It would be unseemly in the petitioner to criticize adversely the decision in the case of *Wise* v. *Commonwealth, supra*, since this case was affirmed on December 23, 1918, by this honorable court by refusal of certiorari, 248 U. S. 582, 39 Supreme Court 287.

Since it is thus admitted by the petitioner that the Commonwealth of Virginia would have had authority to tax the interest of Mrs. Brooke in the trust fund in question if that trust fund had originated in Virginia, the question for consideration by this honorable court narrows itself down to the proposition: "Does the fourteenth amendment to the Federal Constitution compel the several States to adopt retrospective systems of taxation?" Obviously if, under the Constitution, a State is free so to shape its tax laws that consideration is to be had only of the facts as they present themselves during the year in and for which the tax is levied, then it can make no difference what has been the previous history of the persons and property to whom and to which the taxes are made to apply. That retrospective tax laws are not favored by the courts is too clear to require the citation of authority. It is indeed, then, a unique proposition to argue that a provision to the Federal Constitution so restricts the taxing power of a State that the State is not free to impose its taxes according to conditions as they exist when the tax is to be levied, collected and paid, but must of necessity go back and view conditions as they existed some fourteen years before that time.

THE DOCTRINE OF MOBILIA SEQUENTER PERSONAM

The doctrine of *Mobilia Sequenter Personam*, in its applicability to the ownership of intangible personal property, has been upheld by this honorable court *with respect*

to the rights of the State of domicile in every case which has been heretofore presented to it.

Thus, in *Fidelity and Columbia Trust Company* v. *Louisville,* 245 U. S. 54, 38 Sup. Ct. 40, it appeared that the taxpayer was domiciled in Louisville, Ky., but carried on a business in St. Louis, Missouri.

Deposits coming in from this business were made and kept in a St. Louis bank, subject to taxpayer's order. The question was, whether these deposits could be taken into account in determining the amount of the Louisville tax. The court said:

> "So far as the present decision is concerned we may concede without going into argument that the Missouri deposits could have been taxed in that State, under the decisions of this court. *Liverpool and London and Globe Ins. Co.* v. *Orleans Assessors,* 221 U. S. 346, 354, 31 Sup Ct. 550, 55 L. Ed. 762, L. R. A. 1815C, 903. *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853. But liability to taxation in one State does not necessarily exclude liability in another. *Kidd* v. *Alabama,* 188 U. S. 730, 732, 23 Sup. Ct. 401, 47 L. Ed. 669. *Hawley* v. *Maiden,* 232 U. S. 1, 13, 34 Sup. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916 C 842. The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person

taxed. Unless it is declared unlawful by authority, we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a State shall measure the contribution by the values of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558. See also *Tappan* v. *Merchants National Bank*, 19 Wall 490, 22 L. Ed. 189.

"It is true that the decision in *Kirtland* v. *Hotchkiss* concerned Illinois bonds, and that if they were physically present in the taxing State, Connecticut, a special principle might apply, as explained in *Wheeler* v. *Sohmer*, 233 U. S. 434, 438, 3 Sup. Ct. 607, 58 L. Ed. 1030. See *Commissioner of Stamps* v. *Hope* (1891), A. C. 476, 486; Dicey, Confl of Laws (2nd Ed.) 312. But the decision was not made to turn upon such considerations; indeed, its reasoning hardly is reconcilable with them or with anything short of a general rule for all debts. It is argued that in a later case this court has held that the power of taxation not to extend to chattels permanently situated outside the jurisdiction although the owner was within it (*Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493), and that the power ought equally to be denied as to debts depending for

their validity and enforcement upon a jurisdiction other than that levying the tax. But this court has not attempted to press the principle so far, and there is opposed to it the long established practice of considering the debts due to a man in determining his wealth at his domicile for the purposes of this sort of tax.

"The notion that a man's personal property upon his death may be regarded as a universitas and taxed as such, even if qualified, still is recognized both here and in England. *Bullen* v. *Wisconsin*, 240 U. S. 625, 631, 36 Sup. Ct. 473, 60 L. Ed. 830. *Eidman* v. *Martinez*, 184 U. S. 578, 586, 22 Sup. Ct. 515, 46 L. Ed. 697. *Attorney General* v. *Napier*, 6 Exch. 217. It has been carried over in more or less attenuated form to living persons, and the general principle laid down in *Kirtland* v. *Hotchkiss*, *supra*, has been affirmed or assumed to be law in every subsequent case. *Bonaparte* v. *Appeal Tax Court*, 104 U. S. 592, 26 L. Ed. 845. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 29, 31, 11 Sup. Ct. 876, 35 L. Ed. 613. *Savings and Loan Society* v. *Multnomah County*, 169 U. S. 421, 431, 18 Sup. Ct. 392, 42 L. Ed. 803. *New Orleans* v. *Stempel*, 176 U. S. 309, 321, 20 Sup. Ct. 110, 44 L. Ed. 174. *Liverpool and London and Globe Ins. Co.* v. *Board of Assessors for the Parish of Orleans*, 221 U. S. 346, 355, 356, 31 Sup. Ct. 550, 55 L. Ed. 762, L. R. A. 1915C, 903. It was admitted to apply to debts in *Union Refrigerator Transit Co.* v. *Ken-*

tucky, 199 U. S. 194, 205, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493. It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint* v. *Stone-Tracy Co.*, 22 U. S. 107, 146, 162, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1313, *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained."

From the foregoing quotation it is clear that this court has enunciated the following principles to be the law of the land:

1. A State may, in imposing personal charges upon a resident, make that charge commensurate with the citizen's total wealth.

2. That in this total wealth there may be included debts due from citizens of other States.

3. That these debts may be included notwithstanding the fact that the evidences thereof are kept in a foreign State, or that they have a business situs for taxation in that foreign State.

4. That the right to tax possessed by the State of the domicile is in no wise affected by the fact that the State wherein is located the business situs also has the right to tax the debts in question.

In the case at bar, there is no allegation or evidence in the record which would tend to show that the trust fund in question, or any part thereof, has acquired any business

domicile in the State of Maryland or elsewhere. If that State has any authority to tax this fund, it is not on account of any idea of business domicile, or on sole account of the fact that the evidences of debt are held in the city of Baltimore for safekeeping, because the record does not contain any facts to support the former theory, and because the latter theory of taxation has been denounced by this court in *Buch* v. *Beach,* 206 U. S. 392, 51 L. Ed. 1106.

If the State of Maryland possesses any power of taxation over this fund, it must be based upon some notion of the doctrine of *Mobilia Sequenter Personam,* that State viewing as the real owner the trustee which holds the bare legal title. It is unfortunate in this case that the State of Maryland makes a different application of this rule of law from that made by the State of Virginia. Upon analysis it appears that the application of the rule made by the latter State has more to commend it to the conscience, since the beneficiary is the real owner of the fund, the real payer of the tax, the real person to whom governmental protection and advantages are extended.

This principle was clearly recognized and luminously expressed by the Court of Appeals of the State of Maryland, in *Baltimore City* v. *Safe Deposit & Trust Company,* 97 Maryland 659, wherein the court said, with reference to a former case (page 463):

> *"In the absence of any law regulating the imposition and collection of taxes,* the trustee was properly chargeable with the tax."

In deciding the case then before it, the court continued (page 464):

> "When property is held in trust there are two persons, each of whom is in a certain sense its owner. The trustee who holds the title is the owner in a legal and technical sense, but the *cestui qui trust* is the beneficial and substantial owner. We do not think that the legislature has exceeded its power over the subject of taxation or violated any of the provisions of the Bill of Rights or Constitution in providing that personal property of the kind involved in this case shall, for purpose of assessment and taxation, be treated as belonging to its substantial owner and not to its technical holder."

It is, therefore, submitted that the Commonwealth of Virginia has a clear right under the Federal Constitution, when it computes the personal charges which the petitioner should pay as her fair share for the maintenance of the government whose protection she enjoys, to base this charge upon her entire intangible wealth, including the value of her beneficial interest in this trust fund held for her, and that hence the judgment of the Supreme Court of Appeals of the State of Virginia should be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,

By E. WARREN WALL,
Counsel Department of Taxation,
of Counsel.

Richmond, Virginia,
January 18, 1928.

MAY 17 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

No. 229

LUCY B. BROOKE, *Petitioner,*

vs.

CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PANNILL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

PETITION FOR REHEARING

CITY OF NORFOLK,
R. W. PEATROSS,
A. PLUMMER PANNILL,
W. I. GILKESON.

COMMONWEALTH OF VIRGINIA,
E. WARREN WALL, *Counsel, Department of Taxation, of Counsel.*

Richmond, Virginia,
May 16, 1928.

LEWIS PRINTING CO., INC., RICHMOND, VA.

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IN THE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

PETITION FOR REHEARING

To the Honorable, the Chief Justice, and the Honorable, the Associate Justices of the Supreme Court of the United States of America.

Your petitioners, the City of Norfolk, R. W. Peatross, A. Plummer Pannill, W. I. Gilkeson, and the Commonwealth of Virginia, respectfully represent unto Your Honors that they are aggrieved by a judgment entered by this Honorable Court on, to-wit: the 23rd day of

April, 1928 in the above styled case, and your petitioners pray that a rehearing of the said case be granted, or if this Honorable Court deems it improper to grant a rehearing in the said case that certain amendments to the opinion of the Court may be made as will be hereinafter mentioned.

GROUNDS FOR REHEARING

POINT ONE

Your petitioners respectfully show that there are certain statements in the opinion of this Honorable Court which, although contained in the record and constitute a part of the allegations made by the petitioner in her petition before the Corporation Court of the City of Norfolk, and since there is a stipulation in the record, page 21, that the Commissioner of Revenue and Examiner of Records, two officers making the assessment testifid that the *matters and things* set up in the petition were true, but in their opinion the conclusion sought to be drawn from the said *facts* by the plaintiff were incorrectly drawn; were never intended to be stipulated as *facts* admitted to be true but on the other hand were intended to be stipulated as *conclusions of law* sought to be drawn from the facts by counsel for the plaintiff; it being expressly stipulated that in the opinion of the witnesses for the Commonwealth their conclusions of law were incorrectly drawn.

In the record of *Maguire* v. *Trefry,* 253 U. S. 12 almost identic allegations and stipulations are found (Record that case pp 1-5 and 10).

The statements in the opinion of this Court adverted to above are as follows:

"The assessments complained of were for city and state taxes upon the corpus of the trust fund." This statement is found in the record in pages 13 and 18.

"The property held in trust has remained in Maryland and no part of it is or ever has been in Virginia." This statement is found in the record in pages 12 and 17.

"The assessment is a bare proposition to make the petitioned pay upon an interest to which she is a stranger."

This proposition is stated in slightly different verbiage in the record in pages 13 and 18. The statement in the record being as follows:

"That, as will appear from said Item 17 of the said will, the undersigned has no vested interest in the property passing thereby."

While it is true that all the foregoing statements are contained in the allegations of the petition filed in the Corporation Court of the City of Norfolk, and while it was stipulated in that Court that all the *facts* alleged in the petitions were true, the foregoing statements were regarded and treated in the Corporation Court of the City of Norfolk and in the Supreme Court of Appeals of Virginia not as statements of fact stipulated to be true, but as conclusions of law drawn by counsel for the petitioner,

which conclusions of law were denied by witnesses for Commonwealth of Virginia.

The true facts in the case at bar were that the petitioner, who had been and was then a resident of the State of Virginia, was the beneficiary enjoying the entire income for life from a trust fund created by a will of a citizen of Maryland who named the Safe Deposit and Trust Company of the City of Baltimore as trustee to pay the net income from the trust fund to the petitioner for life, then to her daughters for their lives, and, upon the death of the last surviving daughter to divide the principal between the descendants then living of the daughters per stirpes. It is true that whatever investments were made from the proceeds of this trust fund were held and managed in Baltimore.

It clearly appears from these facts that the petitioner had a vested life estate in this trust fund, that the petitioner was a citizen of Virginia, resident in Norfolk. This equitable life estate in intangible personal property or choses in action is property within the State of Virginia, and further, that this equitable life estate, this beneficial interest must be the property or the thing which is taxed by the State under the Virginia law as construed by the Supreme Court of Appeals of this State in *Seldon* v. *Brooke,* 104 Va. 832, *Wise* v. *Commonwealth,* 122 Va. 693; and *Ellett* v. *Commonwealth,* 132 Va. 136, when such cases are given the construction which the Supreme Court of Appeals of the State of Virginia must have intended.

It, therefore, appears that the record in this case is

self contradictory in the three particulars mentioned above.

The following questions present themselves.

One. "Are the three statements above mentioned statements of fact which the record shows stipulated to be true, or, are they merely conclusions of law?"

Two. "If these statements are merely conclusions of law is this court bound by the construction of the Virginia law placed upon it by the Supreme Court of Appeals of this State?"

It is respectfully submitted that the said statements are not statements of fact, but are conclusions of law. If the State taxed the equitable life estate of Mrs. Brooke then the tax is not upon the corpus of the fund itself but upon her interest in it. If the tax is upon this beneficial interest then the property taxed is not in Maryland in contemplation of law, but is in Virginia at the domicile of the owner of the equitable life estate.

In *Wise* v. *Commonwealth,* 122 Va. 693-698 the Supreme Court of Appeals of the State of Virginia, said:

> "A gift to another for his life of the entire income and interest to be derived from a trust fund is a gift of a life estate in the fund. The quantity of the estate is the same, no matter by what name it is called, *and it is this quantity of estate to which the tax laws apply.* (Italics supplied.)

"In *Walker* v. *Hill*, 73 N. H. 254, 60 Atl. 1017, a devise to a wife of the 'Income of the remainder of my estate during her natural life' was held to give to the wife a life estate in the property. In *Little* v. *Coleman* 74 N. H. 215, 66 Atl. 483 there was devised to one daughter 'the use of my farm Vassalborough' during the term of her natural life, and to other daughters 'the income from all the rest and residue of my real estate and personal property' during the term of their natural lives, and in each case it was held that the devises constituted life estates in the property. The question seems to have been passed upon quite often in Tennessee, though it was not always necessary to the decision of the case. We quote from one of the late cases. In *Johnson* v. *Johnson*, 92 Tenn. 559, 23 S. W. 114, 22 L. R. A. 179, 36 Am St. Rep. 104, it is said: 'We are of the opinion that if the devise is valid, then the item passes the fee in the property for the purposes indicated, the net income from which is to be expended and appropriated by the trustees. While there is no specific devise of the property, yet a devise of the rents and profits and income is, in effect, a devise of the property itself. *Polk* v. *Faris*, 9 Yerg. Tenn.) 241 (30 Am. Dec. 400); *Morgan* v. *Pope*, 7 Cold (Tenn.), 547; *Davis* v. *Williams*, 85 Tenn. 648, 4 S. W. 8; *Pilcher* v. *McHenry*, 14 Lea (Tenn.), 88; 1 Jarm. Wills, 152, note; 3 Washb. Real Prop. 529, 530; *Spofford* v. *College* (Jan., 1889).'"

If Mrs. Brooke is the owner of a vested equitable life estate in the fund, and the tax is upon that interest, then

the assessment is not a bare proposition to make the petitioner pay upon interest to which she is a stranger.

It is respectfully submitted that the case at bar, in fact, presents no different question from that passed upon by the Supreme Judicial Court of Massachusetts, February 27, 1896 in *Hunt* v. *Perry*, 165 Mass. 287. This is admitted by counsel for Mrs. Brooke in their reply brief, page 5.

It will be further shown herein (p. 16 *et seq.*) that the question here presented has been answered favorably to the position of the Commonwealth by this Honorable Court in *Maguire* v. *Trefry*, 253 U. S. 12.

The facts in *Hunt* v. *Perry* are set out in 165 Mass. on page 288. It appears that the beneficiaries in that case were the widow and sons of Wm. S. Perry, who, being then an inhabitant of Brunswick in the State of Maine, died on April 8, 1873, leaving a will which was duly admitted to probate in that State. Under the terms of the will, the property upon which the taxes for the collection of which these actions were brought were assessed was given in trust to, and the legal title to it was vested in, Wm. L. Putnam of Portland and Galen C. Moses of Bath, both in the State of Maine. By the terms of the trust, the widow was entitled to one-third of the net income and each of the two sons to one-fifth of the remaining two-thirds of the net income of the trust property. The defendants moved from Maine to Braintree after the death of the testator, and had lived in Braintree for several years prior to 1893. No return was made by

any of the beneficiaries as to their taxable property, and the assessors of taxes of Braintree got their information for making the assessment in question from certified copies of the will, and from the accounts of the trustees filed in Maine. None of the trust property was at any time during 1893 within the Commonwealth of Massachusetts. The court said:

> "Upon the tax-book or valuation-book of the assessors, under the title 'Names of persons assessed,' appeared the names of the three defendants; under the title 'Description of taxable property' appeared the following: 'Morts. $87,000, Bonds, &c. $86,000; and under the title 'Tax' appeared one sum, $2906.40."

A reassessment was subsequently made whereby each of the three defendants was assessed separately upon the respective shares of the fund in question. To all appearances this assessment was against the beneficiaries and they were then taxed with the corpus of the property itself. Under the law in effect in the State of Massachusetts beneficial interests like these were subject to taxation.

The Court said:

> "The statute under consideration rests on the ground that the cestuis que trust residing here have a beneficial interest in the trust fund which is valuable, and that they are in effect the equitable owners thereof. An interest of this kind is property, which the Legislature may subject to taxation. *Bates* v.

Boston, 5 Cush, 93; *Williston Seminary* v. *County Commissioners,* 147 Mass. 427; *Hathaway* v. *Fish,* 13 Allen, 267.

In *Anthony* v. *Caswell,* 15 R. I. 159, cited by the defendants as in point, the statute contained no such provision as that above copies.

The defendants contend that the statute, if such is its true construction, is unconstitutional. This argument rests on the ground that the property is situated out of the State; that the beneficial interest of a cestui que trust is nowhere else made taxable; and that this statute selects for taxation a kind of interest not otherwise taxable, and so impose a tax which is disproportionate. This argument, however, is met by the suggestions already made, that the cestui que trust is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take away the power of the Legislature to subject the interest of the cestuis que trust to taxation here, if they live here. There is no more reason for holding this to be beyond the power of the Legislature than there would be for holding the taxation of *cattle and sheep, of manufactured goods,* or of shares in corporations untaxable here because situated out of the State." (Italics supplied).

On account of the fact that the italicized words in the last sentence quoted above with respect to tangible chattels has been shown by this Honorable Court not to be the

law, it has been intimated that the authority of the doctrine of *Hunt* v. *Perry* has been diminished. It is submitted, however, with all confidence that subsequent cases decided by this court have shown only the above mentioned *dictum* with respect to chattels to be incorrect. The real *doctrine* of the case has been substantially affirmed by this court.

In *Maguire* v. *Tax Commissioner*, 230 Mass. 503, there was again presented to the Supreme Judicial Court of Massachusetts the question of the authority of the State to tax the beneficial owner of a trust fund where that fund was held by a non resident trustee. It is true that in this later case the tax was measured by the annual value of the trust rather than its absolute value.

The court said in this case:

> "It is plain that if the intangible property, legal title to which is held by the trustee in Pennsylvania, were owned in absolute ownership by the cestui que trust resident here it legally would be taxable to her here. That is settled so far as concerns the Constitution of this Commonwealth, by *Hawley* v. *Malden*, 204 Mass. 138, and the many cases there collected, and so far as the Federal Constitution is concerned, by the same case on writ of error in 232 U. S. 1. The question, whether the nature of the right of a cestui que trust in a trust held in a sister State is such as to be subject to taxation here, was before this court in *Hunt* v. *Perry*, 165 Mass. 287. In that case the beneficiary of a trust fund, created under the will of a deceased resident of Maine, held in that

State by trustees there resident and appointed by its courts, was taxed as a resident of the Commonwealth for her interest in the trust. It was said by Allen, J., speaking for the court (p. 291): "The statute under consideration rests on the ground that the cestuis que trust residing here have a beneficial interest in the trust fund which is valuable, and they are in effect the equitable owners thereof. An interest of this kind is property, which the Legislature may subject to taxation. *Bates* v. *Boston*, 5 Cush. 93; *Williston Seminary* v. *County Commissioners*, 147 Mass. 427; *Hathaway* v. *Fish*, 13 Allen, 267 . . . The defendants contend that the statute, if such is its true construction, is unconstitutional. . . This argument, however, is met by the suggestions already made, that the cestui que trust is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take away the power of the Legislature to subject the interest of the cestuis que trust to taxation here, if they live here." Other expressions are used in the course of that opinion, some of which cannot stand in the light of decisions of the United States Supreme Court in *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Delaware, Lackawanna & Western Railroad* v. *Pennsylvania*, 198 U. S. 341; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385, all rendered since *Hunt* v. *Perry*. But it does not seem to us that the soundness of the ground of that de-

cision stated in the words quoted has been shaken by subsequent decisions. The exception to the general principle that personal property is taxable at the domicile of the owner seems to be rather strictly confined to chattels, live stock and other property which possesses a visible corporeal existence and which have acquired a manifest and permanent situs in another state. *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63. These decisions of the United States Supreme Court relied on by the petitioner do not appear to us to have wrought such ruin with the long established practice as to taxation in this Commonwealth as she contends. Indeed the soundness of the reasoning of the opinion in *Hunt* v. *Perry*, 165 Mass. 287, already quoted, appears to us to be sustained in principle by the most recent pronouncement of that court upon the subject in *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54."

That case came by writ of error to this court and was affirmed on April 26, 1920, under the title of *Maguire* v. *Trefry*, 253 U. S. 12. This court said:

"It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title and interest distinct from its legal ownership. "The legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others." 2 Story's Equity

(11th Ed.) 964. It is this property right belonging to the beneficiary, realized in the shape of income, which is the subject matter of the tax under the statute of Massachusetts.

The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the state. *The case presents no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the state which are held taxable at the domicile of the owner. Kirtland* v. *Hotchkiss,* 100 U. S. 491, 25 L. Ed. 558. (Italics supplied.)

We find no error in the judgment and the same is affirmed."

It is clear, therefore, that the Supreme Judicial Court of Massachusetts was of the opinion that *Maguire* v. *Trefry* presented the same question passed upon in *Hunt* v. *Perry;* and further, that court was of the opinion that *Hunt* v. *Perry* was sustained by the decision of this court in *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54.

This court in its opinion in *Maguire* v. *Trefry, supra* did not mention *Hunt* vs. *Perry, supra,* certainly it made no attempt to distinguish it from the case then in hand. Indeed, the court concurred with the Supreme Judicial Court of Massachusetts in thinking that the *Fidelity &*

Columbia Trust Co. v. *Louisville*, 245 U. S. 54, was in point. The court further said that *Maguire* v. *Trefry, supra,* presented no difference in principle from the taxation of credits evidenced by the obligations of persons who are outside of the State which are held taxable at the domicile of the owner. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558.

It is therefore plain since *Fidelity & Columbia Trust Co.* v. *Louisville, supra,* involved the question of property taxes upon intangible personal property, that this court does not regard the taxation of income from intangible personal property as involving a difference in principle from the taxation of the property itself.

It is therefore believed that in *Maguire* v. *Trefry, supra*, this Honorable Court has substantially affirmed the doctrine of *Hunt* v. *Perry, supra.* A careful examination of the authorities does not disclose any criticism by any court of the doctrine of *Hunt* v. *Perry, supra.* That case has been assumed by a majority of the States of the Union to have been the law for more than thirty-two years. The legislative branches of the several States have framed their tax laws upon the theory that *Hunt* v. *Perry* was sound. An examination of the laws and the reports of the taxing authorities of the several states indicate that twenty states impose a tax upon trust funds in accordance with the residence of the beneficiary. That is to say they tax the beneficial interest in the trust fund to the resident beneficiary, even though the trustee be a nonresident and the fund itself be held outside of the State. The States which apply this doctrine are as follows:

Arizona	Kentucky
California	Maryland
Colorado	Minnesota
Connecticut	Missouri
Georgia	North Carolina
Idaho	Oklahoma
Illinois	Oregon
Indiana	Vermont
Iowa	Virginia
Kansas	West Virginia

Thirteen States and the District of Columbia impose taxes upon trust funds strictly in accordance with the residence of the trustee alone. These States are:

Arkansas	Ohio
District of Columbia	Pennsylvania
Maine	Rhode Island
Michigan	South Carolina
Montana	South Dakota
Nebraska	Texas
New Jersey	Utah

Seven States have substituted an income tax for the property tax upon all intangible property which includes trust funds held by non-resident trustees for the benefit of resident beneficiaries. These States are:

Delaware	New York
Massachusetts	North Dakota
Mississippi	Wisconsin
New Hampshire	

Eight States do not seem to assess any tax either upon intangible property or the income therefrom when such intangible property is owned outright, or is held in trust, either by a resident or non-resident trustee for the benefit of either a resident or non-resident beneficiary. These States are:

Alabama	New Mexico
Florida	Tennessee
Louisiana	Washington
Nevada	Wyoming

It is submitted that this Honorable Court should be very reluctant to declare unconstitutional a part of the tax system of twenty of the States, and it should take this step only in case it feels impelled to do so by a plain mandate of the Federal Constitution.

ANALYSIS OF MAGUIRE V. TREFRY

Lest the concatination of ideas which we have advanced seem too attenuated, let us consider the exact point decided by this Court in *Maguire* v. *Trefry,* 253 U. S. 12, and let us consider the same case below in 230 Mass. 503.

The facts disclosed by the record in *Maguire* v. *Trefry, supra,* are almost identical with the facts in the case at bar. The facts in that case were that Mrs. MacArthur, a resident of Philadelphia, created a trust for the benefit of her four children, one of whom was Mrs. Emily M. Maguire. The will of Mrs. MacArthur was probated in the Orphans Court of the County of Philadelphia in the State of Pennsylvania. The Girard Trust Company, the

trustee, held all the physical symbols representing the intangible personal property in Pennsylvania at all times. No part of the said physical symbols ever came into the State of Massachusetts. Mrs. Maguire was paid her share of the income from the Trust fund by cheques mailed from Philadelphia, Pennsylvania, to Cambridge, Massachusetts, (Record pages 1, 2, and 3). This was a spendthrift trust (Record page 7). Mrs. Maguire had no right to assign, alienate, or anticipate any of the income from the Trust fund (Record page 7). It is true that she had the power of appointment which she was permitted to exercise by will. If this power of appointment was not exercised by her, then her share of the trust went by limitation to her children or to others in the event she died without issue. Thus Mrs. Maguire had only an equitable life estate in a spendthrift trust with the power of appointment. In the case at bar, Mrs. Brooke has an equitable life estate in a non-spendthrift trust with full power of assignment, alienation or anticipation, and without the power of appointment, as the limitations over are fixed by the instrument creating the trust.

However, we search the opinion of the court in vain for any intimation that the power of appointment enjoyed by Mrs. Maguire had any bearing upon the taxability of her equitable life estate.

NATURE OF THE MASSACHUSETTS INCOME TAX.

That the Massachusetts income tax sustained by this court in *Maguire* v. *Trefry, supra,* was not an excise tax but was a property tax is made clearly to appear from

the record. The Supreme Judicial Court of Massachusetts decided this question plainly and positively. The court said in this connection (Record, page 21), 230 Mass. 512.

> "The *cestui que trust* has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of these is the right to receive the income. That is a property right. The income when received is property. *The tax here in question is a property tax.* (Italics supplied.) *Tax Commissioner* v. *Putnam*, 227 Mass. 522, 531, 532."

In the later case, the Court said:

> "The question was somewhat argued at the bar whether the tax authorized by the Forty-fourth Amendment and levied by the instant statute is wholly a property tax, as was said in *Opinion of the Justices*, 220 *Mass.* 613, 623, 625, *Perkins* v. *Westwood*, 226 *Mass.* 268, *Pollock* v. *Farmers Loan & Trust Co.* 157 *U. S.* 429, 581; *S. C.* 158 *U. S.* 601, or whether in some aspects and applications it may be an excise, *Springer* v. *United States*, 102 *U. S.* 586, 702 *Brushaber* v. *Union Pacific Railroad* 240 *U. S.* 1, 16, 17, *Flint* v. *Stone Tracy Co.* 220 *U. S.* 107, 150, 152, *Glasgow* v. *Rowse*, 43 *Mo.* 479, 491, *Waring* v. *Mayor & Alderman of Savannah*, 60 *Ga.* 93, 100 *Drexel & Co.* v. *Commonwealth* 46 *Penn. St.*

31, 40. It is not necessary to do more than to refer to 220 Mass. 623-627."

Wherein it was said:

"The second question has two branches. The first is, whether a duty or excise may be levied upon incomes derived from intangible personal property, including interest on debts of every kind and dividends on corporate stocks; the second refers to an excise upon income derived from professions, trades and employments. The bill to which this question relates, Senate Document No. 438, provides in substance for the assessment of an 'excise duty of six per cent of the amount of—income arising or accruing during each calendar year from debts of every description and from stocks of all corporations, domestic or foreign. These classes of personal property are exempted from other taxation, and there are further details as to exemptions—and the collection and distribution of the 'excise duty'. These provisions of the proposed bill constitute a selection of specific articles of property to be assessed by themselves at an unvarying rate, differing from the rate which is assessed upon other property. It is the arbitrary designation of a certain class of property without reference to any rule of proportion and without regard to the relative share of public charges, which it should bear as compared with that borne by other property and without regard to any special benefit accruing to the selected property. Manifestly it is not and does not purport to be a pro-

portionate tax. It cannot be sustained as tax on property, which must be proportional. *Portland Bank* v. *Apthrop,* 12 *Mass.* 252, 255, *Cheshire* v. *County Commissions,* 118 *Mass.* 386, 389. *Gleason* v. *McKay,* 134 *Mass.* 419, 424. Plainly it is laid as an excise. Such an imposition cannot be sustained under the clause of the Constitution relating to excises. A tax upon income from money on deposit or at interest, from bonds, notes or other debts due, and as dividends from stocks, coupled with exemption from all other taxation of the principal from which such income flows, is in substance and effect a tax upon the property from which it is derived. A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. This was decided after most elaborate consideration, with affluent citation of authorities, in *Pollock* v. *Farmers Loan & Trust Co.* 157 *U. S.* 429, 581, *S. C.* 158 *U. S.* 601. We do not need to review that ground or to re-state the arguments in its support. It follows that a tax upon such income is a property and not an excise tax. This point is covered also by *Opinion of the Justices,* touching the so-called three-mill tax, reported in 195 Mass. 607. We adhere to the principles there stated and to the conclusions there reached.

To the same effect see *Opinion of the Justices*, 77 N. H. 611. It is necsary to answer the first branch of this question in the negative."

In this case, the Court said further: (Page 627)

"As has been pointed out in answer to the second question, a tax upon the income of property is a tax upon the property itself."

The Supreme Judicial Court of Massachusetts having thus decided that the Massachusetts substituted income tax is a tax upon the property itself, and this Court, being bound by that decision, having affirmed the right of the Commonwealth of Massachusetts to impose this property tax upon the equitable life estate owned by the citizen of Massachusetts, and held in trust by a foreign trustee, it is not perceived how any different Federal question can be presented, if the property tax is measured by the value of the property or by the capitalized value of the income rather than by the annual income derived from the property. That the tax assailed in *Maguire* v. *Trefry, supra*, was a property tax and not an excise tax appears clearly from the record and from the briefs of both the plaintiff in error and the defendant in error.

And, it is respectfully submitted that since this Honorable Court accords the Commonwealth of Massachusetts the right to impose a property tax upon equitable life estates held by residents of the State of Massachusetts even though the physical symbols which represent the intangible personal property are permanently held outside the State by a non-resident trustee, no reason is perceived

why a similar right should be denied the Commonwealth of Virginia.

WACHOVIA BANK & TRUST CO. V. DOUGHTON, DISTINGUISHED

In its opinion the court cites only one case to sustain the proposition that the Commonwealth of Virginia is forbidden by the Fourteenth amendment to impose taxes upon the equitable life estate in question. This case is *Wachovia Bank & Trust Co.* v. *Doughton, 272 U. S.* 567-575. A careful examination of the opinion of the court in that case seems to disclose the fact that the analogy between the case at bar and the *Wachovia Bank & Trust Co.* v. *Doughton, supra,* does not approach the analogy between the case at bar and the case of *Maguire* v. *Trefry, supra.* In the Wachovia case this court denied to the State of North Carolina the power to tax as a transfer the exercise of a power of appointment by the citizen of the State of North Carolina, which power of appointment was derived from the will of a citizen of the State of Massachusetts. The reason for this denial of authority to tax is very clearly stated by the court (272 U. S. 575).

> "Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power.' The appointee takes, not as the legatee of him who appoints, but of the original donor. 'Property in the hands of domestic trustees appointed under the will of a domestic testator who conferred a power of appointment upon a

> non-resident, must be distributed according to the law of this Commonwealth and . . . the execution of the power must be interpreted according to our law and in conformity to the power conferred.' *Walker* v. *Treasurer & Receiver General,* 221 Mass. 600, 602, 603, 109 N. E. 647, 648, and cases there cited; *Shattuck* v. *Burrage,* 229 Mass. 449, 118 N. E. 889."

For the above mentioned reason, it is thought that the *Wachovia Case* may be distinguished from *Bullen* v. *Wisconsin,* 240 *U. S.* 625. In the latter case, Bullen, a citizen of the State of Wisconsin established a trust fund for the benefit of his widow and children retaining a life interest. This trust fund was placd in the hands of an Illinois trustee. The practical effect of the creation of this trust was the making of a gift intended to take effect at the death of the donor. It was therefore clearly taxable as a part of the universitas of the donor, since it was his own property which he was giving away, while in the *Wachovia Case* the property donated was not that of a citizen of North Carolina but it was the property of a citizen of Massachusetts. Whatever may be said as to the possibility of reconciling the *Wachovia Case* with the *Bullen Case,* it is clear that neither of these cases has a direct bearing upon the case at bar, since both of these cases related to inheritance taxes and not to property taxation. It would hardly be questioned, we think, under the decision of this Court in *Maguire* v. *Trefry,* supra that the State of North Carolina had a right to tax Mrs. Taylor upon the value of her equal life estate as long as she lived, and that the State of Wisconsin would have had a right to tax Mr. Bullen upon his equitable life estate as long as

he lived, because in both these cases, the thing taxed was within the jurisdiction of the State imposing the tax. (See in this connection *Blodgett* v. *Silberman, et al.,* and *Silberman* v. *Blodgett,* Nos. 190 and 191, October term, 1927, decided April 16, 1928, in which the court said (page 6):

> "At common law the maxim 'mobilia sequenter personam' applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to *intangible property, including choses in action,* without regard to whether they are evidenced in writing or otherwise and whether the papers evidencing the same are found in the State of the domicile or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not." (Italics supplied.)

DISTINCTION BETWEEN TAXES ON TANGIBLE AND INTANGIBLE PROPERTY.

In the case at bar an analogy sought to be drawn between the tax upon intangible personal property where the physical symbols representing it are located outside the state of the owner's domicile and tangible personal property so permanently located. That this analogy is not well founded is stated by this court in *Fidelity & Columbia Trust Co.* v. *Louisville, supra,* in which the Court said:

"It is argued that in a later case this Court has held the power of taxation not to extend to chattels permanently situated outside the jurisdiction although the owner was within it; *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed 150, 4 Ann. Cas 493; and that the power ought equally to be denied as to debts depending for their valdity and enforcement upon a jurisdiction other than that levying the tax. But this Court has not attempted to press the principle so far and there is opposed to it the long established practice of considering the debts due to a man in determining his wealth at his domicile for the purposes of this sort of tax."

And in *Maguire* v. *Trefry, supra,* where it is said:

"To support this contention the plaintiff in error relies primarily upon the decision of this court in *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann Cas. 493. In that case we held that tangible personal property, permanently located in another state than that of the owner where it has acquired a situs, and was taxed irrespective of the domicile of the owner—was beyond the taxing power of the state, and that an attempt to tax such property at the owner's domicile was a denial of due process of law under the Fourteenth Amendment. This ruling was made with reference to cars of the Transit Company permanently employed outside the State of the owner's residence. In that case this court, in the opinion of

Mr. Justice Brown, speaking for it, expressly said that the taxation of intangible personal property was not involved. 199 U. S. 211, 26 Sup. Ct. 40, 50 L. Ed 150, 4 Ann. Cas 493."

REASON FOR THE DISTINCTION BETWEEN TANGIBLE PERSONAL PROPERTY AND INTANGIBLES.

The reason for the distinction in the taxable situs of tangible and intangible property so luminously drawn by this Honorable Court in *Union Refrigerator Transit Co.* vs. *Kentucky*, 199 U. S. 194 is not far to seek. It is a distinction which leaps to the eye. Tangible personal property and real estate are *things*. They may be seen and touched and handled. They have a concrete existence in space. They may be measured with a yardstick. A debt on the other hand, an intangible right, is after all merely a mental concept. It is the agreement of two or more minds recognized by the universal conscience and consciousness of humanity. Though the debt may be reduced to writing, the writing is not the right. The writing may be inadvertently destroyed, the right remains. Being, therefore, simply a thought, and agreement between the mind of the debtor and that of the creditor that the debt exists, how can it be said that this thought has any situs of its own? Who can so transfix a thought or impale an idea that it may be brought into the bourne of space, give three dimensions length, breadth and thickness and definitely located in a place so that one may say "In this spot it actually is and has its being, he who would say otherwise is forbidden by the Federal Constitution?"

Only two theories of the law have been advanced for

giving a situs to simple debts. One is the theory that the debt takes its situs from the domicile of the debtor. This theory was disapproved by the court in *State Tax on Foreign Held Bonds* 15 Wall. 300. The other theory, universally recognized by all the courts up to the present moment, is that the doctrine of *Mobilia Sequenter Personam* applies and that the situs of the debt is the residence of the creditor.

It is true that this Honorable Court has recognized two departures from the law of *Mobilia Sequenter Personam*. First: In the case of Specialties as in *Wheeler* v. *Sohmer,* 233 U. S. 434, wherein it is said that a bond is something more than the mere evidence of the debt. It is the debt itself, and by a tradition that comes down to us from more archic conditions, the debt is inseparable from the paper which declares and constitutes it.

However, it is to be remembered in *Wheeler* v. *Sohmer,* supra the court seems to have been careful to recognize the principle that in so far as the state of the domicile was concerned this court would not deny to that state the right to tax the intangible upon the doctrine of *Mobilia Sequenter Personam,* no matter what right might exist touching taxation by the State wherein the bond was physically present.

This idea is fortified by the recent case of *Blodgett* v. *Silberman* and *Silberman* v. *Blodgett* (U. S.) decided April 16, 1928.

The other apparent exception to the rule arises in cases like *Metropolitan Life Insurance Co.* v. *New Orleans,* 205 U. S. 395, *Liverpool and London and Globe Insurance Co.* vs. *New Orleans,* 221 U. S. 346, 354 wherein this court has held that intangible property may be given

a business situs in a state other than the state of domicile to the end that such state of business situs may possess the right to tax the property. However, even in this class of cases as was clearly pointed out by this court in *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S. 54 the exercise of this right by the state of business situs is nugatory in its effect in so far as this may be said to impair the right of the state of the domicile to tax.

As a result of the careful consideration of all the cases heretofore decided by this court, touching the right of the state of the domicile to tax intangible personal property, one reaches the ineluctable conclusion that the court has with respect to the domiciliary state always upheld the doctrine of *Mobilia Sequenter Personam,* and that whatever right of taxation may be acquired by other states, the right of taxation by the state of the domicile has never been seriously questioned.

In the case now at bar we have, as it were, two owners of the fund.

One: The Trust Company in Baltimore which holds the bare legal title.

Two: The real or beneficial owners. The petitioner who holds the life estate, her daughters who hold a life estate in remainder, and the children of the daughters who hold the remainder after the expiration of the two life estates. All these beneficiaries are residents and citizens of Virginia; therefore, the entire beneficial interest is held by citizens of this State.

Unless this Honorable Court is prepared to say that the Fourteenth Amendment requires the pursuit of the shadow and not the substance, unless it is to make taxation a matter of form and not of reality, unless it is pre-

pared to overturn *Hunt* v. *Perry*, and *Maguire* v. *Trefry*, *supra*, and to reverse the whole current of decisions which have gone heretofore, it is respectfully submitted that the Commonwealth of Virginia has a right to tax her citizens upon the beneficial interest which they hold in trust funds even though the bare legal title may be held elsewhere.

Since a majority of the states which have substituted the income tax for the property tax on intangibles, and a large majority of the states which have retained the property tax follow the rule that the tax should in all fairness be collected and enjoyed by the state in which the beneficial owner resides, and enjoys the fruition of the trust, along with the protection and advantags afforded by the laws of the State where he resides; if this court should now declare such domiciliary taxation to transcend the Constitution, the remarks of the Supreme Court of Appeals of the State of Virginia in *Wise* v. *Commonwealth*, 122 Va. 693, would become increasinly pertinent.

> "Citizens of this State can by creating foreign trusts deprive the State of a very large part of its revenue."

REQUESTED AMENDMENT TO THE OPINION

POINT TWO

In the event that this Honorable Court feels that it is bound by all the statements in the record in this case and that these statements are statements of *fact* which have been stipulated so that the Court does not feel at liberty

to consider the verity of the statement as to the tax complained of being upon the corpus of the trust fund, that the property taxed has remained in Maryland and no part of it has ever been in Virginia, and that Mrs. Brooke has no vested interest in the fund in question, then in that event the Commonwealth of Virginia respectfully requests this Honorable Court so to amend its opinion delivered on April 23, 1928, that it may be made plainly to appear that the decision of this case was purely and simply upon the record presented to the court, and that the wider question of the validity of the tax policy of the State of Virginia and nineteen of her sister states has not been passed upon and declared to be invalid.

The reason for this request is that while the case at bar is relatively unimportant, the amount of tax involved being insignificant, yet the principle of the right of the State to tax its citizens upon beneficial interests held by them in foreign trusts is of prime importance. Wide publicity has been given to the decision of the court in the public press of the State of Virginia, and the theory has been advanced that the entire tax policy of the State in this regard has been declared invalid.

The question of such taxability of such beneficial interest is a matter which frequently presents itself to the Department of Taxation of the State of Virginia, and the Department feels that it should be advised precisely whether this Honorable Court has decided the case at bar simply upon the record presented, or upon the question of the entire tax policy of the State in refrence to

taxation of beneficial interests held by residents in foreign trusts.

Respectfully submitted,

CITY OF NORFOLK,

By Counsel

R. W. PEATROSS,
A. PLUMMER PANNILL,
W. I. GILKESON,

and

COMMONWEALTH OF VIRGINIA,

E. WARREN WALL, *Counsel,*
Department of Taxation.
of Counsel.

Richmond, Virginia,
May 16, 1928.

SUPREME COURT OF THE UNITED STATES.

No. 229.—October Term, 1927.

Lucy B. Brooke, Petitioner, *vs.* City of Norfolk, R. W. Peatross, A. Plummer Pannill, et al.	On Writ of Certiorari to the Supreme Court of Appeals of the State of Virginia.

[April 23, 1928.]

Mr. Justice Holmes delivered the opinion of the Court.

The petitioner applied in the local form of proceeding for the correction of two assessments for taxation alleged to be erroneous and contrary to the Fourteenth Amendment. The Court of first instance, The Corporation Court of the City of Norfolk, upheld both assessments as valid, and the Supreme Court of Appeals of Virginia rejected a petition for a writ of error on the ground that the judgment below was plainly right. A writ of certiorari was granted by this Court. 274 U. S. 734.

The assessments complained of were for City and State taxes upon the corpus of a trust fund created by the will of a citizen of Maryland resident in Baltimore at the time of her death. This will bequeathed to the Safe Deposit and Trust Company of Baltimore eighty thousand dollars in trust to pay the income to the petitioner for life, then to her daughters for their lives, and, upon the death of the last survivor, to divide the principal between the descendants then living of the daughters per stirpes. The will was proved in Maryland and in 1914 was admitted to probate in the Corporation Court of Norfolk as a foreign will. The property held in trust has remained in Maryland and no part of it is or ever has been in Virginia.

The petitioner has paid without question a tax upon the income received by her. But the doctrine contended for now is that the petitioner is chargeable as if she owned the whole. No doubt in the case of tangible property lying within the State and subject to a paramount lien for taxes, the occupant actually using it may be made personally liable. *Illinois Central R. R. Co.* v. *Kentucky,*

218 U. S. 551, 562. *Carstairs* v. *Cochran*, 193 U. S. 10, 16. But here the property is not within the State, does not belong to the petitioner and is not within her possession or control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. See *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567, 575.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.